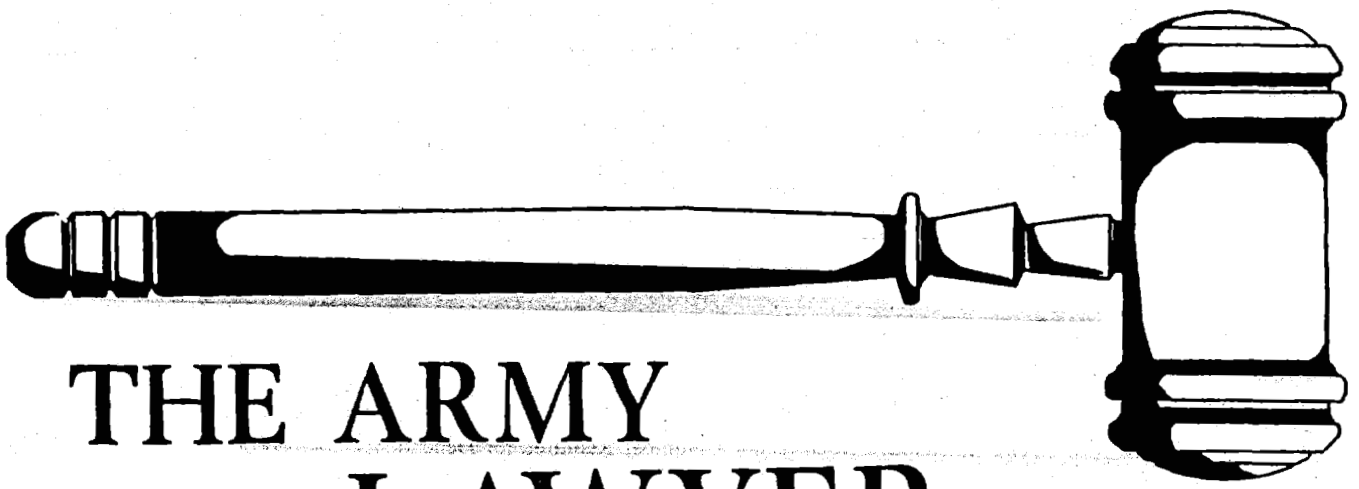

THE ARMY LAWYER

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Table of Contents

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Editor
Captain David R. Getz

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LA (27-3c) 24 August 1987

MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: 1988 Army Tax Assistance Program

1. This coming tax season will be the first time we will be required to apply the Tax Reform Act of 1986 to the mass preparation of tax returns. The lessons learned from the W-4 Forms indicate that mastering the new tax forms and laws will be a challenge.

2. We cannot expect the successes of the past two tax seasons to be repeated without a considerable amount of additional preparation for the upcoming tax season. In order to be adequately prepared you should:

--Start planning your program now. Appoint your installation/unit tax program coordinator.

--Obtain advance copies of next year's tax forms from the Internal Revenue Service (IRS) or the Federal Register.

--Begin coordination with the IRS for your VITA classes and community outreach programs.

--Order adequate supplies of publications explaining the new law such as IRS Publication 553 (Highlights of 1986 Tax Changes) and office research materials.

--Continue to publicize the need to revise W-4 Forms and apply for Social Security Account Numbers for all family members five years of age and older.

--Participate in the IRS electronic filing program where possible.

3. Our goal is to provide the best tax assistance possible for our soldiers and their families.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZX

14 September 1987

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Expanded Judge Advocate Requirements

1. Listed below are functional area breakdowns of new or expanded requirements which, it is anticipated, will strain judge advocate assets:

a. Acquisition Related

(1) New protest forum - The GSBCA now hears protests of ADP procurements.

(2) Secure environment contracting - SEC now receives a much more thorough legal review.

(3) ALS - Specialty management - The need for additional specialists in acquisition law requires significant increased management attention.

(4) DOD reorganization - Acquisition, and therefore additional acquisition related personnel, has been a focal point of the DOD reorganization.

(5) GAO protests - The number of GAO protests is increasing even more rapidly than the 5% annual increase in contract actions.

(6) Commercial activities - Contract legal support at installations is increasing and many senior officials are dissatisfied with the commercial activities program.

(7) Reform efforts - Recent years have seen an increase in studies of the procurement process.

(8) Fraud - There has been increased activity in contract fraud, waste and abuse and its detection, debarment and suspension, affirmative civil litigation and contract remedies. For example, the Program Fraud Civil Remedies Act now being implemented by DOD Directive allows a relatively low level action (up to $150,000 per alleged violation) before an administrative law judge to recover money due the U.S. This is supposed to be tried at the installation level. Permission to proceed must be granted by an O-7 (perhaps BG Holdaway) and coordinated with the Department of Justice.

b. Litigation Related

(1) Felony Prosecution Program - Judge advocates now prosecute in federal district court felonies occurring on Army installations.

(2) Tort litigation - An increasing number of judge advocates are being assigned as Special Assistant U.S. Attorneys to handle Army tort cases.

(3) Environmental litigation - The increased emphasis on environmental clean up activities has required additional judge advocate resources at headquarters and installation levels.

c. Labor Related

(1) Office of Special Counsel - Attorneys are increasingly being used as liaison in OSC investigations of "whistleblower" accusations.

(2) Coordination with CPO - Army regulations now require coordination of all formal disciplinary actions with the labor counselor.

(3) Security clearance denial/revocation - This is a source of increased legal activity as a result of recent court decisions.

(4) Commercial activities - The increase in the number of government contractors and their employees at installations requires more Army legal knowledge of government contract labor law and private sector labor law.

(5) EEOC - Labor counselors now serve as the sole representative before the EEOC and labor counselors now represent the command in the preliminary investigation of discrimination complaints.

(6) FLRA - Recent decisions of the FLRA indicate that extensive labor counselor involvement will be required in negotiations with unions representing NAFI employees.

d. Legal Assistance Related

(1) Alternative dispute resolution - The increased number and complexity of legal disputes (such as the 1987 Authorization Act creation of a test program for waiver of rental deposits) creates the need for the legal assistance community developing ADR programs to avoid the necessity of going to court.

(2) In-court representation - This program must be expanded to assist soldiers who cannot afford civilian counsel.

(3) Tax assistance - This program must be expanded to address the complex tax laws facing soldiers.

e. Criminal Law Related

(1) Reserve Jurisdiction Act - Creates GCM jurisdiction over reservists by active duty GCMCAs.

(2) DOD Reorganization - Creates new GCMCAs for CINCs.

(3) Solorio - Expands the definition of service connected crimes.

(4) Victim/Witness Assistance Program - SJAs must establish and supervise command programs.

(5) Due process hearings for transfer of soldier-inmates for long term psychiatric treatment - judge advocate representation is required.

(6) Confinement of soldiers in military facilities as a result of host country trials in accordance with SOFA and other international agreements - requires military magistrate review.

f. Administrative Law Related

(1) Post-employment conflict of interest - The 1987 DOD Authorization Act permits DOD personnel to seek a written opinion from their ethics counselor as to the applicability of 10 USC 2397(b).

(2) Increased use in "non-JAG" billets - Congressional imposed officer reductions may create the need for JAGs performing duties heretofore performed by line officers such as Article 32 officers, SCM officers or "force multipliers" in staff work.

(3) Legal support for combatant commands - The DOD Reorganization Act of 1987 greatly increased responsibilities of combatant commands. This may lead to the need for more legal support for these commands.

g. Operational Law Related

(1) Use as operational law officers - There is an increasing need for legal advice on plans, exercises and rules of engagement.

(2) Security assistance - Outside the context of particular exercises, there is an increasing need for legal advice on security issues plus the matters of technology transfer, interoperability and unit exchanges.

2. These and other requirements test our ability to be innovative in providing legal services to our clients. Please review this list and use it at your installations.

FOR THE JUDGE ADVOCATE GENERAL:

ROBERT E. MURRAY
Colonel, JAGC
Executive

A Long Way Since Houston: The Treatment of Blacks in the Military Justice System

*Colonel Ned E. Felder**
Senior Judge, Panel 5, United States Army Court of Military Review

I deem it a high honor to participate in this Eighth Annual JAG Training School and CLE Seminar. Neither the death of a close relative this week nor a severe sore throat could prevent me from attending this conference. Although I was graduated from a law school in South Carolina, this is my first visit to this illustrious law school. I attended a predominantly black law school in Orangeburg, I suspect because I am predominantly black. I am extremely proud of South Carolina State College School of Law, which is no longer in existence, because in its history it produced a total of about sixty lawyers, seven of whom are judges. The most notables are The Honorable Matthew J. Perry, United States District Court in South Carolina and former judge of the United States Court of Military Appeals; The Honorable Ernest Finney, Associate Justice, South Carolina Supreme Court; and The Honorable Paul Webber, Judge, District of Columbia Superior Court. In 1963, Ralph "Tiny" Sparks became so disgusted because he could not pass the South Carolina Bar examination, that he went to New York, took the bar exam, and became a judge there. Your host, Colonel Jasper M. Cureton, Judge, South Carolina Court of Appeals, is not counted among the seven, but he received his legal foundation at our law school because he attended it for one year before coming to this university and I do not want him to forget that fact.

The principal purpose of my remarks is to discuss with you the progress the Army Court of Military Review has made over the years in resolving racial issues that are unique to the military. Some of you are perhaps saying, "Here we go again, listening to that racial stuff." You might have the same reaction when you constantly hear about the holocaust, Japanese-Americans requesting compensation for internment, or native Americans complaining about land that was taken from them at the unenlightened expense of aristocratic red warriors and kings. Well, this time it's going to be different. You are going to receive CLE credit for listening to this racial stuff. I feel it is my duty to discuss racial matters as long as there are actual and perceived injustices in the military. A few days ago, the general counsel of the NAACP called me to determine with whom he could discuss the racial complaints filed with his office by nine officers, including a medical doctor. Since the military is a microcosm of the civilian communities, as long as New York becomes Georgia becomes South Boston becomes Selma becomes New York, the subject warrants discussion. Moreover, a dreadfully disproportionate percentage of accused in courts-martial are black and if I do not discuss their cause, who should be expected to do so?

The United States Army Court of Military Review has existed by that name since 1969.[1] Prior to that time, this intermediate appellate tribunal was composed of "boards of review." The original Army boards of review were established as a result of two troublesome incidents in Texas. The first incident involved the court-martial of a number of noncommissioned officers at Fort Bliss on charges of mutiny for refusing to attend a drill formation. All were found guilty and sentenced to a dishonorable discharge and confinement ranging from 10 to 20 years.

> The second incident involved the Houston riots. It has been written that [n]o other event during the First World War portended such vast change in the review of court-martial proceedings as the trial of the black troopers of the 24th Infantry in late 1917. Throughout that summer there were frequent racial confrontations between the soldiers acting as guards for the construction of a training camp and the city police and townspeople of Houston, Texas. Most of these incidents consisted merely in applying epithets of opprobrium to each other, sometimes resulting in a soldier's arrest.
>
> Matters came to a head on August 23, when two black soldiers were arrested by the local constabulary in Houston for disorderly conduct. Rumors quickly reached the soldiers' camp that one had been killed by the police. The enraged soldiers raided their unit supply tents for weapons and ammunition and marched out of camp into Houston. During the next several hours, 15 white men . . . were killed. . . .[2]
>
> A general court-martial was convened on November 1. [Sixty-three] black soldiers were tried jointly by court-martial. Fifty-eight were convicted, of whom 13 were sentenced to death and five acquitted. Although not required by law to do so, the commander at Fort Sam Houston had sought to ensure total fairness in the case by assigning his staff judge advocate to review the unfolding transcript of the proceedings on a daily basis. Because a state of war existed, the commander was authorized . . . to carry out death sentences without submitting the case for further review or confirmation. Having received assurances as to the legality of the convictions, the commander ordered the executions to be conducted the morning after completion of the trial.[3]

The men were executed before their records could be forwarded to Washington for examination and without them having the time or opportunity to seek clemency. Shortly thereafter, General Order No. 7 required that no serious sentence be executed prior to review by the Judge Advocate General. The Judge Advocate General then established a

*This article was originally presented as a speech to the Eighth Annual Judge Advocate General Training School and Continuing Legal Education Seminar, held at the University of South Carolina School of Law on March 8, 1987. The Seminar was sponsored by Headquarters, 120th U.S. Army Reserve Command, the 12th Military Law Center, the Military Law Section of the South Carolina Bar, and the University of South Carolina School of Law.

[1] Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335.

[2] The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 125 (n.d.).

[3] *Id.*

board of review to advise him on the review of courts-martial. During World War I (6 April 1917 to 30 June 1919), thirty-five soldiers were executed and during World War II (7 December 1941 to 22 February 1946), 142 soldiers were executed, primarily for the offenses of murder and rape. Of course, the one exception during World War II was Private Eddie Slovik, who was executed for desertion. During World War II, an average of four months elapsed from the time of trial to execution. Between 1947 and 1950, five soldiers were put to death. Since the establishment of the United States Court of Military Appeals in 1950, ten soldiers have been executed. The last death sentence was carried out in 1961, more than six years after it was adjudged.

I suspect that a significant number of soldiers executed were black. Since *Furman*[4] in 1972, five soldiers received the death penalty, four of whom were black. Their sentences have been commuted to life. The lone white soldier's case is presently pending before an en banc Army Court of Military Review. We have come a long long way since Houston.

The Vietnam Era generated new issues as black soldiers sought their identity. These issues were not indigenous to civilian courts. The young soldiers resented being referred to as Negroes and when they rebelled, they were cast as troublemakers and punished for insubordination. They were sent to prison for disobeying orders related to wearing the afro hair style and black bracelets, giving the black power salute, and dapping (the manner in which they greeted each other). White commanders did not realize that such signs, symbols, and accoutrements advertised a need to belong where one feels accepted, and of greater significance, they advertised the pride in being black. They were not indicators of anti-establishment but rather of an establishment defect. As conditions improved, the need for such symbols decreased and we no longer have the occasion to review cases involving these issues.

Today, an Army regulation governs the wearing of jewelry, and generally allows soldiers the latitude to style the hair so that it is neatly groomed and does not interfere with the normal wear of headgear or protective mask.[5] A year ago, the U.S. Supreme Court upheld an Air Force regulation that prohibited an Orthodox Jew from wearing his yarmulke while in uniform.[6]

During the late 60s and early 70s, racial tensions were high. Like Houston, the bond of brotherhood among black servicemen unfortunately sometimes resulted in multiple accused being involved in a single incident, and being defended by a single defense counsel, who was invariably and predominantly white. I recall a case in which eleven black soldiers charged with riotous acts were defended in a joint trial by one attorney.

In another case, *United States v. Evans,*[7] a black soldier and four white soldiers had been accused of raping a prostitute in a barracks. All five were assigned to the same defense counsel. The counsel rejected the idea that all five accused be tried together because he said possible racial discrimination against Evans could hurt the white soldiers. This decision was made at a meeting between the defense counsel and the white accused. But the white accused wanted to be tried with Evans so they could help him. Although the four white accused volunteered to testify for Evans, the counsel called only one because he feared a possible disadvantage to them at their own trials. Evans was convicted first and sentenced to ten years confinement and a dishonorable discharge. The four white soldiers obtained new counsel after Evans was convicted. Of the four, one was acquitted, two received sentences of six months confinement, and another was released when the charges were dropped. The Army Court of Military Review affirmed the findings of guilty and the sentence. The Court of Military Appeals, in overturning the conviction, said the lawyer had placed possible advantages to Evans second to the interests of the other four.

I do not condemn the defense counsel for the tactical decision he made, even though two white accused attributed certain racial slurs to the defense counsel.[8] What is important is that he recognized racial prejudice in the courtroom. What is most distressing is that this case had to go all the way to the Court of Military Appeals before the racial injustice was corrected.

Since *Evans*, the Courts of Military Review has vigorously enforced the ABA standard that an attorney should decline to represent more than one client except when it is clear there is no conflict of interest and when the accused consent to such multiple representation. My panel published an opinion consistent with *Evans* five weeks after *Evans* was decided.[9] We have come a long long way since Houston.

The time when black soldiers sought clear identity and a sense of belonging was a volatile, confusing, and transitory period, and the courts of military review had to address the resulting problems. Some black soldiers not only resented being called Negroes but also violently opposed to being referred to as "boy." Judge Finkelstein, dissenting in *United States v. Johnson,* wrote the following (and please note that in this opinion he used the terms "Negro," "black," and "Afro-American," which indicates the confusion I referred to earlier).

> On 7 November 1969 at a gun site in Vietnam, . . . Lieutenant M . . ., feeling he was faced with possible insubordination, ordered the accused as follows, "lock you heels, boy." The appellant, a Negro, responded, "I do not have to be at ease or to come to attention and don't call me boy." These words constitute the disrespect of which the appellant stands convicted.

[4] Furman v. Georgia, 408 U.S. 238 (1972).

[5] Dep't of Army, Reg. No. 670–1, Uniforms and Insignia—Wear and Appearance of Army Uniforms and Insignia, paras. 1–14, 1–8 (20 May 1987).

[6] Goldman v. Weinberger, 475 U.S. 503 (1986).

[7] 50 C.M.R. 170 (A.C.M.R.), *rev'd*, 1 M.J. 206 (C.M.A. 1975).

[8] The defense counsel allegedly said that he was shifting from defense to prosecution so he could burn those black punks who were smacking whites. 50 C.M.R. at 171.

[9] United States v. Piggee, 2 M.J. 462 (A.C.M.R. 1975).

These events occurred at a time when over 5,000 Negro soldiers had been killed by hostile action in connection with the conflict in Vietnam. Thirteen black soldiers had earned the Medal of Honor. These were not boys, they were men in the finest sense of the word. Afro-Americans have complained with documented justification of the denial of their manhood forced upon them by a society which at times has failed to afford them all the rights, privileges and appurtenances of full citizenship. The term "boy" reflects the real and figurative emasculation complained of so bitterly by citizens of all races concerned with interpersonal relations. The word is as profane and insulting as "kike," "wop," "nigger," "spick," "polack" and "jap." The record clearly shows that the appellant and Sergeant S understood the word, boy, to have been used with this connotation. Nothing less than a gentleman is truly suited for the exercise of the responsibilities imposed upon commissioned officers of the United States Army. The privileges and prerogatives which attend officership are directly derived from those duties and responsibilities. No gentleman uses terms such as these. The fact that Lieutenant M used the term inadvertently and claimed that no racial slur was intended serves to explain but not justify his failure to respect the dignity and human rights of the accused whose welfare had been committed to his charge. When an officer's conduct falls below the standards a soldier has every right to expect, he strips from himself some of the mantle of special protection afforded him by the Congress. [10]

Similarly, in *United States v. Richardson,* [11] an officer and a noncommissioned officer (NCO) were slapped by a black marine for repeatedly referring to him as "boy." The Navy Court of Military Review and the Court of Military Appeals agreed that the use of the term "boy" was an act of provocation and stripped the officer and NCO of their status. Although the assaults were not justified, a substantial reduction of the sentence was appropriate. It is interesting to note that when a black NCO called a black soldier "boy" and the soldier responded "I am not your boy, I'm not your f-----g boy. I have a wife and kids just like you have." and struck the NCO in the face, the Army Court of Military Review ruled that the NCO would not demean his own race and that he was merely referring to the accused's youthfulness. [12] This is a thought stimulating opinion. I was not serving on the court when it was written.

I do not perceive my appointment to the Army Court of Military Review as having been made simply to add color to the court, but to bring to the judiciary the full dimensions of my black experience and to serve as an instrument of constructive change. In appropriate cases, my opinions have reflected a special sensitivity to racial prejudice. In a dissenting opinion in *United States v. Whitfield,* [13] I wrote that a black soldier involved in a confrontation with a white soldier in a foreign country was overcharged, oversentenced, and underrepresented because he was black. In another case I felt that denying a defense counsel the opportunity to cross-examine a white soldier about his biases and prejudices toward black soldiers was error. [14]

Black servicemen have played an important role in the development of this nation and have earned the right to equal justice. Their proven fitness during time of war, without civil equality at home, has been a thread throughout our history. Men of color were called upon to bear arms and fight the Indians in the Massachusetts Bay Colony in 1643. Black soldiers were the first to die in the Revolution. They responded to the call of Paul Revere at Bunker Hill, Shiloh, and Concord. They served in an integrated Army during the Revolution. They spied, built bridges and forts, and crossed the Delaware with George Washington. They stood with Andrew Jackson heroically and made possible the victory at New Orleans. They reversed the tide of the Civil War with unprecedented intrepidity, valor, and cost. Black soldiers made possible and lighted Sherman's march to the sea. I am certain that you know that Brigadier General Joseph Hayne Rainey was appointed as the Judge Advocate General of the South Carolina National Guard in 1873 and that there were eight other black general officers who served in the South Carolina National Guard during that period.

Black soldiers opened the plains for white soldiers and trappers for three decades as the most feared men in blue. They served without a whimper at the Alamo and died with Custer at his last stand. Black soldiers chased Sitting Bull into Canada and captured Geronimo. They turned defeat into victory at San Juan Hill, and saved the life of Colonel Theodore Roosevelt during the Spanish-American War. They fought with remarkable courage in France in World War II and a black soldier was that war's first American hero. In Korea, a black private first class killed more of the enemy with an M-1 rifle than either Sergeant Alvin York or Audie Murphy. And no one in this room can doubt that they fought with extraordinary valor in a far off place called Vietnam, just as their white brothers fought with extraordinary valor. Thus, your black history lesson in the event you did not attend a program during Black History month.

So it seems to me, one cannot ask a man to die and simultaneously deny him the right to equal justice. In a few months, we shall observe the bicentennial of the United States Constitution. This great country of ours has come a long way in a short period of time. When one realizes that Egypt is the cradle of a civilization more than 5000 years old; that in Rome one can gaze upon the ruins of the Colosseum, the Forum, and the Pantheon and survey emblems of twenty centuries of Roman achievements; that China is over 4000 years old and its history includes many dynasties and emperors; that in Great Britain, with all its majesty and royalty, history goes back to over fifty-five years before the birth of Christ; then one can only conclude that this country is still an infant and 200 years is but a twinkle of the eye in the history of a nation.

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[10] 43 C.M.R. 604, 606 (A.C.M.R. 1970) (Finkelstein, J., concurring in part and dissenting in part).

[11] 6 M.J. 656 (N.C.M.R. 1978), *aff'd*, 7 M.J. 320 (C.M.A. 1979).

[12] United States v. Allen, 10 M.J. 576, 577 (A.C.M.R. 1980).

[13] 7 M.J. 780, 783 (A.C.M.R. 1979) (Felder, J., dissenting).

[14] United States v. Harris, 2 M.J. 1089, 1090 (A.C.M.R. 1977).

Yet, the United States Constitution is the oldest written instrument of national government in the world. By comparison, only fourteen of the world's 160 written constitutions predate World War II. For this reason alone, we should not forget the key role these now faded four pages of parchment have played, not only in American history, but in world history as well.

The Constitution is a living document, that is, it grows old as we do. That which does not grow old—dies. The life and essence of the Constitution come from its interpretation by judges. It means what we judges say it means. It means, "bigots have as much right to a fair trial as anyone else" as the Army Court of Military Review stated in reversing the conviction in a case in which a white soldier killed a black person and said "that's one less nigger I have to worry about."[15] Thus, your lesson on the U.S. Constitution.

I believe that the black population of the United States has no destiny separate from that of the nation of which they form an integral part. Our destiny is bound up with that of America. Her ships are ours, her pilots are ours, her storms are ours, her calms are ours. If she wrecks upon any rock, we break with her. If we, born in America, cannot live upon the same soil on terms of equality with the descendants of Scotsmen, Englishmen, Irishmen, Frenchmen, Germans, Hungarians, Greeks, and Poles, then the fundamental theory of America fails and we fail with her. That cannot be allowed to happen.

I pledge to you that within the bounds of its imperfections and authority, the Army Court of Military Review will continue to ensure that black and white soldiers receive the same rights, privileges, immunities, protections, due process, sensitivities, and considerations under the Constitution of the United States and the Uniform Code of Military Justice. We have come a long long way since Houston. Amen.

[15] United States v. Massey, 50 C.M.R. 346, 348 (A.C.M.R. 1975).

United States v. Gipson: Out of the *Frye* Pan, Into the Fire

Major Craig P. Wittman
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Introduction

The Court of Military Appeals has delivered its long awaited[1] opinion in *United States v. Gipson*[2] and has altered the course of future courts-martial practice in the area of scientific evidence. This article will examine the holding in the case, the new standard for general admissibility of scientific evidence, and the future application of the new standard to polygraph evidence in courts-martial.

The *Gipson* Decision

Facts

The accused in *Gipson* submitted to two polygraph examinations, one by the government and one by the defense. The defense sought to lay a foundation for the admissibility of its exculpatory examination, while the government advised the military judge that the accused was deceptive in its examination when he denied his involvement in the alleged crimes.[3] The military judge ruled that neither the defense nor the government would be permitted to lay a foundation to admit evidence of the polygraph examinations because of the lack of acceptance of polygraph results in the scientific and judicial communities. The accused was ultimately found guilty of three specifications each of possession, transfer, and sale of lysergic acid diethylamide.[4]

The Death of Frye

The court ruled that the accused should have been allowed to attempt to lay a foundation for polygraph evidence.[5] The *Gipson* decision is the death knell of *Frye v. United States*[6] as the be-all-and-end-all standard for the admissibility of scientific evidence. The *Frye* standard will still have some vitality as a factor in determining probative value as will be discussed below.[7]

New Standard for Scientific Evidence

In rejecting *Frye* as the standard for the admissibility of scientific evidence, the court resolved a long standing conflict with the Military Rules of Evidence. The drafters' analysis to Rule 702 states that the Rule may be broader and may supersede *Frye.*[8] Indeed, the *Gipson* opinion is a

[1] Petition for review was granted on 15 February 1984. 17 M.J. 343 (C.M.A. 1984).

[2] 24 M.J. 343 (C.M.A. 1987).

[3] *Id.* at 247–48.

[4] *Id.* at 247.

[5] *Id.* at 253.

[6] 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard held that, to be admissible, the scientific evidence offered must be generally accepted in the "particular field in which it belongs." *Id.* at 1014.

[7] *See infra* text accompanying notes 28–29. *See also* Note, *Absolute Bar Against Polygraph Evidence Lifted:* Frye *Test Superseded,* The Army Lawyer, Sept. 1987, at 36.

[8] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 702 analysis, app. 22, at A22–45.

classic articulation of how the Rules are designed to be used together for the "promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined."[9] To that end, *Gipson* refers specifically to four pertinent military rules which together describe a comprehensive scheme for dealing with expert testimony.[10]

The sum of the first three rules amounts to what is sometimes called legal relevance. Military Rule of Evidence 401 defines relevant evidence in the least restrictive terms possible. It is a standard of mere logical relevance. Mil. R. Evid. 402 states the obvious. Relevant evidence is admissible and irrelevant evidence is not admissible. Mil. R. Evid. 403 requires the exclusion of relevant evidence if its probative value is substantially outweighed by certain, enumerated dangers. When evidence presents the potential for one of these dangers, the evidence is more likely to be admitted if it is more probative or more relevant than required under the mere logical relevance standard in Mil. R. Evid. 401.

The fourth rule is Mil R. Evid. 702, which permits testimony by experts, in the form of an opinion or otherwise, "[i]f . . . [it] will assist the trier of fact to understand the evidence or to determine a fact in issue." According to one commentator, "the test is whether the expert can be helpful."[11]

Gipson therefore articulates a two-part test for the admissibility of scientific evidence. The evidence must be relevant (Mil. R. Evid. 401–403) and helpful (Mil. R. Evid. 702).[12]

Constitutional Premises

It is interesting to note the treatment given by the *Gipson* court to the constitutional arguments that were presented. The court rejected a constitutional right to present a defense in the form of favorable polygraph evidence.[13] To ground the opinion on such a right may have precluded the government from using polygraph evidence as no such right exists for the government. The court thereby allows the government and the defense to present polygraph evidence that is determined to be relevant and helpful.

The court had a kinder view of the due process argument, but explicitly stated that the government may also use polygraph evidence in appropriate cases. Military trial judges were cautioned, however, that due process may require them to "bend even further than normal in the direction of giving the accused the benefit of the doubt"[14] when deciding whether the relevant and helpful standard is met and in conducting the Mil. R. Evid. 403 balancing test. The court also stated, regarding the two-way street of admissibility, "[I]n marginal cases, due process might make the road a tad wider on the defense's side than on the Government's."[15] This treatment reflects the general idea that the accused should be protected and is also consistent with fairness to the accused and the government.

Use of Polygraph Evidence

The *Gipson* opinion makes it clear that polygraph evidence relating to the credibility of certain statements does not relate to the examinee's character.[16] This forecloses the full range of objections under Mil. R. Evid. 608. For example, a witness need not have his or her credibility attacked prior to the introduction of polygraph evidence. Also barred is an objection based on Mil. R. Evid. 608, which prohibits the use of extrinsic evidence to prove a specific instance of conduct.

The court established two uses for polygraph results. Each requires that the examinee testify at trial. First, a polygrapher could "opine whether the examinee was being truthful or deceptive in making a particular assertion *at the time of the polygraph exam.* It would then be for the factfinder to determine whether an inference [exists] regarding the truthfulness of the examinee's in-court testimony."[17] In this first instance, any witness' credibility could be undermined or supported with polygraph evidence regardless of whether the witness' credibility had been attacked.

Regarding the second use, the court stated, "Theoretically, it is conceivable that an expert's opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to guilt or innocence."[18] The court went on to say that it "would not condone such opinion testimony absent the examinee's consistent in-court testimony. If it were otherwise, the conclusions of the expert concerning the credibility of the examinee would be the only evidence presented to the factfinder."[19] What exactly does this mean? Simply stated, to support a direct inference as to guilt or innocence, the questions asked during the polygraph examination must embrace the ultimate issues in the case and the examinee must testify. The questions asked during the polygraph examination must be specific enough to enable the finder of fact to arrive at only one conclusion if the polygrapher's opinion is accepted. For example, if the accused is charged with distributing drugs to named persons on specific dates, the questions asked of him must include all relevant information. If the accused simply denies ever having distributed drugs and deception is indicated, the finder of fact is not limited to a single conclusion as to guilt or innocence as the accused may have distributed drugs to other than the named persons on different dates.

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[9] Mil. R. Evid. 102.

[10] 24 M.J. at 251.

[11] S. Saltzberg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 588 (2d ed. 1986).

[12] 24 M.J. at 251.

[13] *Id.* at 252.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 253 (emphasis in original).

[18] *Id.*

[19] *Id.*

The uses for polygraph evidence established in *Gipson* may come into play when considering the testimony of several different kinds of witnesses. When the accused is the examinee, the uses seem clear. An inference regarding the truthfulness of the accused's in-court testimony may be drawn and if the questions to the accused during the polygraph examination are specific enough, a direct inference as to guilt or innocence may be made.

If, however, the examinee is a victim, a government witness, or a defense witness, the uses may not be as clearly applied. For example, if a defense alibi witness testifies that he was with the accused at the time an offense was allegedly committed and it would be physically impossible for the accused to have committed the alleged offense, it does not necessarily follow that a direct inference of innocence may be drawn if a polygrapher's opinion supports that testimony. The defense witness may have a problem remembering the exact time and date of the offense or he may have confused the accused with another person. Likewise, if an assault victim testifies that the accused assaulted her, a polygrapher's opinion supporting that testimony may not lead to a direct inference of guilt. The victim may have had difficulty perceiving the event because of emotions or poor eyesight, and her testimony may be tainted by some prejudice or bias that affected her perception. Problems such as the ones indicated involving perception and memory may only go to weight, however, and the proponent should still argue that the inference may be applied.

In any given case, the proponent must articulate a proper use. The more collateral the issue becomes, the less likely it is that polygraph evidence will have sufficient probative value to survive the Mil. R. Evid 403 balancing test discussed below. Proponents of polygraph evidence must therefore evaluate the circumstances of each case to determine if polygraph evidence may be helpful.

It is also important to understand what the court in *Gipson* did not say. The court did not say that polygraph evidence should have been admitted in *Gipson,* or in any other case. It simply allows the proponent to attempt to lay a foundation for the admission of polygraph evidence.

Application of the Standard

Only time will tell how the *Gipson* relevant and helpful standard will be treated in the trial courts. The following presents one methodology to counsel and military judges for determining the admissibility of polygraph evidence.

Relevance

To determine relevancy, one must look to Mil. R. Evid. 401–403. Mil. R. Evid. 401 is a standard of mere logical relevance.[20] In order for polygraph evidence to be used in the ways stated by the *Gipson* court, the first requirement to make the evidence relevant will be the in-court testimony of the examinee. If the examinee does not testify, no inference of whether the examinee testified truthfully in court can be made. If the examinee does testify, the polygraph results may still be excluded as a result of the Mil. R. Evid. 403 balancing test. The proponent must therefore present more evidence to boost the polygraph evidence beyond the mere logical relevance threshold.

The second foundational requirement will be a showing of the validity of the scientific theory.[21] The polygrapher may have some training in this area, but a proponent would be better able to satisfy this requirement with experts from the fields of medicine and behavioral sciences. Behaviorists should show that humans will react emotionally to certain stimuli and physiologists should relate that emotional reactions result in physiological responses. Taken together, these witnesses should establish that humans will be fearful when confronted with a situation that may lead to their being caught in a lie and that fear will be expressed in physiological responses.

Third, the proponent must show that technology exists that can record physiological changes. There is little controversy over the ability of the polygraph to accurately measure and monitor such data as pulse, respiration, blood pressure, and galvanic skin resistance.[22] Testimony from the polygrapher should be sufficient to satisfy this foundational requirement.

The fourth requirement is the reliability of polygraphs in general. Here the proponent will find it difficult to present useful, consistent data. Studies in this area are numerous but the results are far from consistent. Reliability rates in studies range from 17% to 100%.[23] A proponent may therefore present evidence of studies that have high reliability rates, but the opponent will also be able to show that the reliability rates in studies vary significantly.[24]

Fifth, counsel must establish the good working condition of the polygraph. The polygrapher can testify regarding the proper maintenance of the polygraph machine, and whether those maintenance services had been done. The polygrapher must also state that the machine was in proper working order on the day of the exam. Certain procedures have also been established to screen examinees for suitability. Some people are not suitable or susceptible to being tested. In each case, the polygrapher must testify that these procedures were followed with the examinee in question.[25]

Finally, the proponent must present the qualifications of the polygrapher.[26] Again, all of this evidence is designed to boost the relevance of the evidence to make it more probative. Even if all other foundation requirements are met, a less than fully qualified polygrapher may tip the balance to excluding the evidence.

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[20] *Id.* at 251.

[21] *See generally* P. Giannelli & E. Imwinkelreid, Scientific Evidence 231–48 (1986).

[22] *Id.* at 233.

[23] *Id.* at 238–41.

[24] *Id.*

[25] *See* A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 616 (1978).

[26] P. Giannelli & E. Imwinkelreid, *supra* note 21, at 235–38.

Helpful

In addition to relevance, the second major criterion for the admission of polygraph evidence is that it must be helpful. Arguably, once the evidence is determined to be relevant, it will also be helpful. For the sake of enhanced likelihood of admissibility, however, the proponent should also lay this foundational requirement by the numbers.

First, Mil. R. Evid. 702 requires that the expert have scientific, technical, or specialized knowledge.

Second, the evidence must relate to a fact in issue. For example, if the issue was consent and the victim of a rape showed no deception on a polygraph when she stated that she had sexual intercourse with the accused, the polygraph evidence would not relate to the fact in issue.

Third, the proponent must show that the evidence is relevant. Evidence that is not relevant is not helpful. Of course, the initial step in the foundational process was just such a showing of relevance.

The *Gipson* court also suggested that the helpfulness standard of Mil. R. Evid. 702 implies a quantum of reliability beyond that required to meet a standard of bare logical relevance.[27] Therefore, the reliability established under the relevance inquiry should be persuasive in determining whether the evidence is helpful.

Determining Admissibility

Now that *Frye* has been rejected as the independent controlling standard for admissibility, how is the judge to know whether scientific evidence should be admitted? The military judge is going to have to use his or her own judgment, based on the evidence submitted to lay a foundation. But even if the military judge finds the polygraph evidence to be relevant and helpful, he or she must still conduct the Mil. R. Evid. 403 balancing test. The evidence will be admissible unless the probative value of the evidence is substantially outweighed by certain enumerated dangers.

The first inquiry then is, "How probative is the evidence?" Interestingly, *Gipson* rejects *Frye* as the standard, but retains it as one important factor in determining probativeness and helpfulness.[28] If the scientific evidence is generally accepted in the relevant scientific community, its probative value should be high. But other factors may be considered. The *Gipson* case refers the military judge to Weinstein[29] for a discussion of other factors that may be persuasive. This is fortunate for polygraph proponents because it seems clear that polygraph evidence cannot meet the *Frye* test, either as a standard or a factor.[30] The Weinstein factors include the degree of acceptance in the scientific community, the polygrapher's qualifications, the use of polygraphs in non-legal areas, normal rates of errors, whether the data is objectively measured (e.g., chemical analysis) or subjectively measured (e.g., polygrapher's or handwriting expert's opinion), and whether an expert pool exists for independent evaluation. Obviously, a well-qualified polygrapher who examines a willing and suitable subject under ideal conditions will produce an opinion whose probativeness has the best chance of surviving the Mil. R. Evid. 403 balancing test. What are the dangers that are weighed against the probative value?

Dangers

The dangers enumerated in Mil. R. Evid. 403 are unfair prejudice, confusion of the issues, misleading the members, undue delay, waste of time, and needless presentation of cumulative evidence. If the polygraph evidence is found to be relevant and helpful, it should be admitted unless its probative value is substantially outweighed by one of these dangers. The most likely dangers associated with polygraph evidence will be confusion of the issues, waste of time, and the possibility of misleading the members.

Confusion of the issues may exist when too much attention is drawn away from the main issues in the case and directed toward collateral matters. A number of witnesses will have to be called to lay the foundation for admitting polygraph evidence. The opponent will probably call a like number of witnesses to rebut the proponent's evidence. The whole process will be very time-consuming, and compared to the other evidence in the case, the time spent on polygraph evidence may be inordinate. All this may lead to a case where the polygraph is on trial and not the accused.

Waste of time will also be an issue. The military judge will be required to sit through a lengthy procedure for laying the foundation. If the military judge decides to admit the evidence, the same foundation should be laid again before the members so they can accord the evidence its proper weight.

The final danger is misleading the members. The concept of misleading the members refers primarily to the possibility of the members overvaluing the probativeness of a particular item of evidence. Professor Graham, in his *Handbook of Federal Evidence,* gave an example of the possibility of the members overvaluing the probative value of evidence. His example involved the polygraph.[31]

Considering the posture of the evidence currently available as outlined in *Gipson,* if the military judge allows counsel to lay a foundation for the admission of polygraph evidence and conducts the Mil. R. Evid. 403 balancing test on the record, it would be surprising to see an appellate court find error for an abuse of discretion if the evidence was excluded. The probative value is questionable, the uses of the evidence are limited, and the potential for confusing the issues and misleading the members is great.

Scenario

A brief discussion of a possible scenario may be helpful to determine how these issues should be framed.

Assume that an accused person passes either a government or private examination and testifies at trial. After *Gipson,* the military judge must allow the defense to attempt to lay a foundation for the evidence. The government

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[27] 24 M.J. at 251.

[28] *Id.* at 252.

[29] *Id.* (citing 3 J. Weinstein & M. Berger, Weinstein's Evidence para. 702[03] (1985)).

[30] *Id.* at 249.

[31] M. Graham, Handbook of Federal Evidence 185 (2d ed. 1986).

will probably challenge the foundation every step of the way. The government may be placed in the awkward position of using experts to attack the foundation that it had used in earlier cases to establish a foundation for its evidence. Accordingly, the government may wish to limit its attack to the polygrapher, the suitability of the examinee, and the condition of the machine. Defense counsel should be cautious to avoid this same awkward position.

If the accused passed a private exam, the government should request the defense to produce data from the private exam and any audio or video recordings of the exam. This data may be used to evaluate the technique of the examiner, the demeanor of the accused, and maybe even allow for an independent opinion. The government should also request that the accused be required to take a government polygraph examination. If an accused refuses to take a government exam, that fact could probably be considered by the military judge in conducting the Mil. R. Evid. 403 balancing test. The theory upon which the polygraph is based requires the examinee to be fearful when faced with the possibility of being caught in a lie. The military judge could determine that the accused had nothing to fear in the private examination, and therefore the reliability of the results would be questionable.

Conclusion

The court in *Gipson* concluded that the *Frye* test should be abandoned in favor of a test using the Military Rules of Evidence and expressed the opinion that the state of polygraph evidence may be such that it should be admitted in courts-martial. To that end, the court has opened the door to the defense and the government and has invited them to marshal the evidence at the trial level.[32] In each case, the military judge must consider a wide range of factors and the decision will rest in the military judge's discretion. The subjective nature of polygraph evidence is such that even after the evidence has been admitted in a number of cases, the battle will still be waged in each succeeding case. While the outcome in each case may not be predicted, the *Gipson* decision will likely result in this issue being hotly contested in each trial where polygraph evidence is sought to be admitted. It may be said that the court in *Gipson* has taken the issue of the admissibility of scientific evidence out of the *Frye* pan and thrown it into the fire.

[32] 24 M.J. at 253.

The Defense Right to Psychiatric Assistance in Light of *Ake v. Oklahoma*

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> [U]pon the trial of certain issues, such as insanity . . ., experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable to parry by his own witnesses the thrusts of those against him."
>
> Justice (then Chief Judge) Benjamin Cardozo[1]

Introduction

Within the past thirty years, the United States Supreme Court has played a dominant role in providing indigent defendants with the basic resources needed to participate effectively in their criminal trials. The landmark case of *Griffin v. Illinois*[2] established the right to a free trial transcript for appeal. Subsequent cases established the rights to waiver of filing fees for appeals,[3] and to state-supplied counsel at trial,[4] on appeal,[5] in misdemeanor cases,[6] and in certain probation revocation proceedings.[7]

The scope of an indigent defendant's right to other nonlawyer assistance has not been answered by the Court. Until recently, the Court's ambiguous 1953 decision in *United States ex rel. Smith v. Baldi*[8] remained its final word on the subject. *Baldi* rejected the claim that the state had a constitutional duty to appoint a psychiatrist for a pre-trial determination of an indigent defendant's sanity. In reaching this conclusion, the Court emphasized that a court-appointed psychiatrist had examined the defendant and had testified as to his sanity at the time of the offense.[9] In *Ake v. Oklahoma,*[10] the Court again addressed this issue and

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[1] Reilly v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929).

[2] 351 U.S. 12 (1956).

[3] Burns v. Ohio, 360 U.S. 252 (1959).

[4] Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] Douglas v. California, 372 U.S. 353 (1963).

[6] Argersinger v. Hamlin, 407 U.S. 25 (1972). In Scott v. Illinois, 440 U.S. 367 (1979), the Court narrowed this right to those misdemeanor cases in which imprisonment was actually imposed.

[7] Gragnon v. Scarpelli, 411 U.S. 778 (1973).

[8] 334 U.S. 561 (1953).

[9] *Id.* at 568. It was unclear whether under *Baldi* an indigent defendant had no right to access to a psychiatric expert or whether access to a "neutral" psychiatrist was constitutionally sufficient.

[10] 470 U.S. 68 (1985).

created a limited right to psychiatric assistance when an indigent defendant's sanity at the time of the offense is likely to be a significant factor at trial.

The analysis that follows critically examines the *Ake* decision, reviews how federal courts have interpreted its precedent, and attempts to define its significance in trials by courts-martial. The article will also discuss the potential impact upon this analysis of the Insanity Defense Reform Act of 1984[11] and its military counterpart.[12]

Ake v. Oklahoma

Statement of the Case

In October 1979, Glen Burton Ake and his co-defendant, Steve Hatch, quit their jobs on an oil rig, borrowed a car, and began looking for a house to burglarize.[13] They drove to the home of Reverend and Mrs. Richard Douglas and gained entrance to the home by pretending to be lost and needing to use the telephone.[14] Holding Reverend and Mrs. Douglas and their two children, Brooks and Leslie, at gunpoint, the defendants ransacked the house. They then bound and gagged the father, mother, and son, and took turns attempting to rape twelve-year-old Leslie Douglas. Failing in these attempts, they forced Leslie to lie on the living room floor with the rest of her family.[15]

Ake then shot Reverend Douglas and Leslie each twice, and Mrs. Douglas and Brooks once, and fled. Reverend and Mrs. Douglas were killed, but the two children managed to untie themselves and drive to a nearby doctor.[16]

Following a month-long crime spree through several states, Ake and Hatch were captured by Colorado police. Ake was extradited from Colorado to Oklahoma. He confessed to the Douglas murders and signed a forty-four page written statement.[17]

Ake was charged with murdering Reverend and Mrs. Douglas and wounding their two children. He was arraigned in Feburary 1980. At the arraignment hearing, the trial judge found Ake's behavior "bizarre" and sua sponte ordered a competency evaluation. Ake was diagnosed as a paranoid schizophrenic and on April 10 was ordered committed to a state mental hospital for treatment.[18]

Six weeks later, the chief forensic psychiatrist informed the court that Ake was competent to stand trial provided he continued to receive 200 milligrams of Thorazine, an antipsychotic drug, three times daily.[19] Proceedings against Ake resumed.

At a June pre-trial conference, Ake's appointed counsel requested funds for a psychiatric evaluation, or in the alternative, requested to have Ake evaluated by a court-appointed psychiatrist to determine whether Ake was insane at the time of the offenses. The court denied the motion.[20]

Ake was tried for two counts of murder in the first degree and for two counts of shooting with intent to kill. The state sought the death penalty for both counts of murder. At the guilt phase of trial, Ake's sole defense was insanity. Ake's counsel called the three psychiatrists who had evaluated the defendant, but none could testify about the issue of Ake's sanity at the time of the offense because none had examined him from that perspective.[21] Thus, Ake could present no expert testimony in support of his insanity defense.[22] The jury found him guilty on all counts.

At the sentencing proceeding, the prosecution offered no new evidence, but relied upon testimony of the three psychiatrists, elicited during cross-examination at trial, that Ake posed a future danger to society. Ake had no psychiatric experts to rebut this testimony or to introduce evidence in mitigation of his punishment. The jury sentenced Ake to

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[11] 18 U.S.C. § 20 (Supp. III 1985). The Insanity Defense Reform Act of 1984 substantially changed the federal law and procedure concerning the insanity defense. The Act provides the following:

§ 20. Insanity defense

(a) Affirmative Defense. It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of Proof. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

For a detailed analysis of the significant changes within the Insanity Defense Reform Act, see Carroll, *Insanity Defense Reform,* 114 Mil. L. Rev. 183 (1986).

[12] Military Justice Amendments of 1986, Pub L. No. 99–661, §§ 801–808, 100 Stat. 3816, 3905–10 (1986) (to be codified at Uniform Code of Military Justice art. 50a, 10 U.S.C. § 850a) [hereinafter UCMJ art. 50a]. UCMJ art. 50a adopted the identical language of 18 U.S.C. § 20 (Supp. III 1985). For the purposes of this article, shifting the burden of proof to the defense by clear and convincing evidence is the most relevant change. For further discussion of this relevance, see *infra* notes 102–07 and accompanying text. For a detailed discussion of all of the changes to the insanity defense created by UCMJ art. 50a, see Williams, *Not Guilty—Only by Reason of Lack of Mental Responsibility,* The Army Lawyer, Jan. 1987, at 12.

[13] In his dissenting opinion, Justice Rehnquist describes the crime in detail to support his argument that Ake was sane at the time of the offense. 470 U.S. at 88.

[14] Ake v. State, 663 P.2d 1, 4 (Okla. Crim. App. 1983).

[15] 470 U.S. at 88–99.

[16] *Id.* at 89.

[17] *Id.*

[18] *Id. at 72.*

[19] *Id.*

[20] *Id.* During Ake's three-month hospitalization, no inquiry was made into his sanity at the time of the offense. *Id.*

[21] *Id.*

[22] Although Oklahoma law permitted lay testimony to support the insanity defense, the use of lay testimony alone was apparently futile. *See* Note, *Due Process and Psychiatric Assistance:* Ake v. Oklahoma, 21 Tulsa L.J. 121, 136–40 (citing cases). At trial, Ake had the burden of overcoming a presumption of sanity by raising sufficient evidence of insanity in order to shift the burden to the prosecution to prove sanity beyond a reasonable doubt. 470 U.S. at 72 n.1.

death on each murder count, and to 500 years imprisonment on both counts of shooting with intent to kill.[23]

The Oklahoma Court of Criminal Appeals affirmed Ake's conviction and death sentence.[24] The court relied on *United States ex rel. Smith v. Baldi* in denying Ake's claim that he, as an indigent defendant, should have been provided the services of a court-appointed psychiatrist.[25] The United States Supreme Court granted certiorari on this issue.[26]

The Court's Analysis

In an 8–1 decision,[27] the Supreme Court reversed the decision of the Oklahoma Court of Criminal Appeals. Justice Marshall, writing for the majority, based his opinion on "the Fourteenth Amendment's due process guarantee of fundamental fairness."[28] After reviewing the Court's decisions expanding the rights of indigent defendants over the past thirty years, Justice Marshall reaffirmed that the states must provide an indigent defendant with the "basic tools of an adequate defense or appeal."[29]

In determining whether, and under what circumstances, psychiatric assistance was a "basic tool," the court employed the three-prong balancing test of *Mathews v. Eldridge.*[30] The three factors weighed by the court were: the private interest that will be affected by state action; the governmental interest affected if the safeguard is provided; and "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of erroneous deprivation of the affected interest if those safeguards are not provided."[31]

The Court quickly disposed of the first two factors. The Court concluded that the private interest "of the individual in the outcome of the state's effort to overcome the presumption of innocence [was] obvious and weigh[ed] heavily in our analysis."[32] The state's fiscal interest was assessed as "not substantial,"[33] and the state's interest in prevailing at the trial was "tempered by its interest in the fair and accurate adjudication of criminal cases."[34]

In assessing the probable value of psychiatric assistance and the risk of error at trial if such assistance is not provided, the Court discussed at length the "pivotal role that psychiatry has come to play in criminal proceedings."[35] The Court cited the statutes and judicial decisions of forty-one states[36] and subsection (e) of the Criminal Justice Act,[37] which provides access by indigent defendants to psychiatric experts "necessary for an adequate defense," as realistic reflections of the potentially crucial role psychiatric assistance may play in allowing a defendant to marshal his defense.

While conceding the importance of psychiatric assistance when a defendant's mental state is at issue,[38] the Court also noted that psychiatry is not an exact science, and that psychiatrists disagree "widely and frequently" on all aspects of a defendant's mental condition.[39] Because there is no single, accurate psychiatric conclusion on legal insanity in a given case, the Court highlighted the important factfinding role of the jury. The Court recognized that the jury could make the most accurate determination of the insanity issue when psychiatrists for each party testified concerning their examination, investigation, and other information, and interpreted this testimony in light of their expertise. The Court suggested that psychiatric testimony was "crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' "[40]

The Court concluded that without psychiatric assistance to assess the availability of an insanity defense, to present testimony, and to assist in preparing the cross-examination

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[23] 470 U.S. at 73.

[24] *Ake,* 663 P.2d at 1.

[25] *Id.* at 6. The court cited Irwin v. State, 617 P.2d 588 (Okla. Crim. App. 1980). In *Irwin,* the court had rejected a similar claim, citing United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953).

[26] 470 U.S. at 73. Ake had also petitioned the Supreme Court, alleging that the Thorazine he was given at the trial rendered him unable to understand the proceedings against him or to assist counsel with his defense. The Supreme Court did not reach this issue. *Id.* at 74 n.2. For a detailed analysis of the Court's jurisdiction for this direct appeal, see Note, Ake v. Oklahoma: *The New "Fundamental Error" Exception to* Wainwright v. Sykes, 1985 B.Y.U. L.Rev. 559 (1985).

[27] Chief Justice Burger concurred in the result, but wrote a separate opinion arguing that "Nothing in the Court's opinion reaches non-capital cases." 470 U.S. at 87. Justice Rehnquist wrote a dissenting opinion. *Id.* at 88.

[28] *Id.* at 76. Because the Court concluded that the due process grounds guaranteed Ake his requested assistance, the Court did not consider the applicability of the equal protection clause or the sixth amendment. *Id.* at 87 n.13. For an analysis of the significance of the Court's reliance only on due process grounds, see *The Supreme Court, 1984 Term—Leading Cases,* 99 Harv. L. Rev. 120 (1985) [hereinafter *Leading Cases*]

[29] 470 U.S. at 77 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

[30] 424 U.S. 319 (1976).

[31] 470 U.S. at 77.

[32] *Id.* at 78.

[33] *Id.* The Court noted that many states and the federal government currently make psychiatric assistance available to indigent defendants. *Id.* at 78 n.4 (citing statutes and cases for 41 states).

[34] *Id.* at 79.

[35] *Id.*

[36] *Id.* at 79 n.4.

[37] 18 U.S.C. § 3006 (e) (Supp. III 1985).

[38] While the Court outlined the current reliance on psychiatric experts, it was careful to distance itself from the practice by stating, "we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice." 470 U.S. at 82.

[39] *Id.* at 81.

[40] *Id.* at 82.

of the state's psychiatrist, the risk of an inaccurate resolution of sanity issues was extremely high. The risk of error and the benefits of such assistance were highest "when the defendant's mental condition [was] seriously in question."[41]

Following this three-pronged analysis, the Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must assure the defendant "access to a competent psychiatrist who will conduct examination and assist in evaluation, preparation, and presentation of the defense."[42] The Court qualified this holding by stating that the defendant had no constitutional right "to choose a psychiatrist of his personal liking or to receive funds to hire his own."[43] The implementation of this right was left to the states.[44]

The Court summarized a similar due process analysis in dealing with the special case of psychiatric assistance on sentencing when the state offered psychiatric testimony of the defendant's future dangerousness. Again, the Court emphasized the importance of the jury's factfinding role in weighing the significance of opposing views of prosecution and defense psychiatrists to "uncover, recognize, and take due account of . . . shortcomings" in predictions of future dangerousness.[45] The Court held that:

> In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.[46]

Finally, the Court distinguished the thirty-two-year-old decision in *United States ex rel. Smith v. Baldi*[47] on two grounds. First, the Court emphasized that the *Baldi* decision never suggested that the Constitution denied an indigent defendant the right to any psychiatric assistance whatsoever. Because two "neutral" psychiatrists had examined the defendant as to his sanity and had testified at trial, the Court demonstrated that the *Baldi* decision, at most, stood for the proposition that the defendant had no constitutional right to more psychiatric assistance than he received.[48]

Second, the Court recognized a more fundamental disagreement with the *Baldi* decision. *Baldi* was decided before indigent defendants even had a constitutional right to the presence of counsel at trial.

> Our recognition since then of elemental constitutional rights . . . has signaled our increased commitment to assuring meaningful access to the judicial process. . . . [W]e would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today. Shifts in all these areas since the time of [Baldi] convince us that the opinion in that case was addressed to altogether different variables, and that we are not limited by it in considering whether fundamental fairness today requires a different result.[49]

Application of the Analysis to the Case

The six factors underlying the Court's conclusion that Ake's insanity at the time of the offense was a significant factor at trial included: Ake's only defense was insanity; Ake's bizarre behavior at arraignment requiring a competing examination; the state psychiatrist's conclusion that Ake was incompetent to stand trial; Ake was only found competent to stand trial on condition that he receive large doses of Thorazine; the testimony of the examining psychiatrists describing Ake's severe mental illness less than six months after the offense, and the suggestion that this mental illness may have begun several years earlier; and Oklahoma's recognition of an insanity defense that requires the defendant to bear the initial burden of producing evidence.[50] The Court specifically expressed no opinion as to which of these factors, alone or in combination, was necessary to make this finding.[51] In applying the foregoing analysis to these facts, the Court concluded that the denial of state-supplied psychiatric assistance during the guilt and sentencing phases of trial denied Ake due process. It reversed and remanded for a new trial.[52]

Separate Opinions

In a short concurring opinion, Chief Justice Burger stated, "Nothing in the Court's opinion reaches non-capital cases."[53] Justice Marshall's detailed analysis of an indigent defendant's right to psychiatric assistance, his election not to restrict the analysis to capital cases, and the fact that six Justices chose to join in the majority opinion suggest that

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[41] *Id.*

[42] *Id.* at 83.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 83–84 (quoting Barefoot v. Estelle, 463 U.S. 880, 899 (1983)). The issue of dangerousness is not discussed in this article because it is not recognized as an aggravating factor in military cases. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 [hereinafter R.C.M.].

[46] 470 U.S. at 84

[47] 344 U.S. 561 (1953); *see supra* note 9 and accompanying text.

[48] 470 U.S. at 84.

[49] *Id.* at 85 (footnote omitted).

[50] *Id.* at 86.

[51] *Id.* at 86 n.12.

[52] On remand, Ake again was convicted of murder despite psychiatric diagnosis as a paranoid schizophrenic. The jury imposed a sentence of life imprisonment. N.Y. Times, Feb. 14, 1986, at 15, col. 1 (late ed.).

[53] 470 U.S. at 87.

the Court's decision was intended to include non-capital cases.[54]

Justice Rehnquist dissented.[55] He argued that Ake's behavior at the time of the offense did not suggest insanity.[56] Even accepting this factual premise, Justice Rehnquist found the constitutional rule announced by the Court far too broad. He would have limited the rule to capital cases, "and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant."[57]

Application of the Ake Standard

Ambiguities in the Opinion

Beyond the capital versus non-capital case application raised by Chief Justice Burger, *Ake* raised two other key ambiguities. First, the opinion did not articulate an objective standard for determining when a defendant's sanity will be a significant factor at trial. Second, the entitlement to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense"[58] did not define clearly the role of the state-supplied psychiatrist.

The Defendant's Threshold

The Court's opinion states that before the right to state-supplied psychiatric assistance arises, the defendant must make a preliminary showing "that his sanity at the time of the offense is likely to be a significant factor at trial."[59] This threshold requirement is consistent with current military practice, which requires the accused to demonstrate that a government-supplied expert witness is "relevant and necessary."[60] The only guidance provided by the Court was the detailing of the six factors that made Ake's sanity an obvious issue in this case. A review of recent military and federal cases applying the *Ake* standard provides some further guidance.

The only reported military decision discussing the accused's threshold burden of demonstrating insanity as a significant factor is *United States v. Davis.*[61] The Navy-Marine Corps Court of Military Review found that Davis had crossed this threshold when the military judge ordered a sanity board,[62] the results of the board indicated some mental disorder, the defense asserted lack of mental responsibility at trial, the government and defense presented evidence on the merits regarding the defenses of lack of mental responsibility and partial mental responsibility, and the military judge instructed the members on these issues on findings and sentence.[63] While the testifying psychiatrist concluded that Davis had a personality disorder, not recognized as a mental disease or defect supporting an insanity defense,[64] Davis' sanity was the central theme of her trial and her primary defense.

Two recent cases from the Tenth Circuit also help demonstrate when a defendant's sanity presents "a significant factor at trial." In *United States v. Sloan,*[65] the court held that the indigent defendant made a clear showing that his mental condition would be a significant factor at his trial for kidnapping. The defense had introduced evidence of the defendant's prior history of psychiatric treatment, abnormal psychiatric test results, treatment with antipsychotic drugs, and a report of a court-appointed psychiatrist diagnosing the defendant as suffering from a borderline schizoid personality.[66] In *United States v. Crews,*[67] the court reached a similar conclusion when the defendant introduced evidence that he was a mental patient at the time of the offenses, and four psychiatrists testified about the technical diagnosis of the defendant's mental condition at trial.[68]

In both of these cases, the defense presented substantial independent evidence that the defendant's sanity at the time of the offense was doubtful. With the exception of psychiatric reports, this evidence was available to the defense without expert assistance. *Ake* suggests that this substantial, objective showing to the trial judge is required before the

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[54] For a detailed analysis of whether the majority opinion reaches non-capital cases, see Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 U. Mich. L. Rev. 1326, 1343 (1986) [hereinafter *Expert Services].* For the purposes of this article, this issue is unimportant; the Court of Military Appeals already has applied the *Ake* precedent to non-capital cases. *See, e.g.,* United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985) (accused charged with housebreaking and assaults); *see also* United States v. Davis, 22 M.J. 829 (N.M.C.M.R. 1986) (accused charged with unauthorized absences, disobedience, disrespect, and assault).

[55] 470 U.S. at 89.

[56] *Id.; cf. Leading Cases, supra* note 28, at 133 n.20 (claiming that Justice Rehnquist misunderstood Ake's mental illness).

[57] 470 U.S. at 89 (Rehnquist, J., dissenting).

[58] 470 U.S. at 83.

[59] *Id. See supra* note 42 and accompanying text.

[60] *See* R.C.M. 703(d).

[61] 22 M.J. 829 (N.M.C.M.R. 1986). In *Davis,* a U.S. Navy interior communications electrician fireman, E–3, was convicted by special court-martial of multiple minor offenses including unauthorized absences, disrespect, disobedience, assaults and communicating threats. Before analyzing whether a sanity board inquiry under paragraph 121, Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter M.C.M. 1969], satisfied the due process standard in *Ake,* the court analyzed the threshold issue of whether the accused's sanity was a significant factor at trial.

[62] *See* M.C.M., 1969, para. 121. For a general overview of sanity board procedures applicable at the time of *Davis,* see Dep't of Army, Technical Manual No. 8–240, Psychiatry in Military Law (Sept. 1981).

[63] 22 M.J. at 832.

[64] *Id.* at 834.

[65] 776 F.2d 926 (10th Cir. 1985).

[66] *Id.* at 928–29.

[67] 781 F.2d 826 (10th Cir. 1986).

[68] *Id.* at 834.

due process requirement for psychiatric assistance arises.[69] Merely asserting the insanity defense with no independent evidence raising doubts about the defendant's sanity fails to meet this threshold.[70] In practice, military trial defense counsel must introduce evidence to the military judge or the convening authority of an accused's prior treatment for mental illness, bizarre behavior, use of antipsychotic drugs, results of a preliminary sanity inquiry, or similar substantiation before requesting the assistance of a psychiatric expert.

Required Psychiatric Assistance

Once an accused has demonstrated that his sanity will be a significant factor at trial, the key issue turns to the nature of the psychiatric assistance mandated by *Ake*. Two general conclusions concerning the role of the government-supplied psychiatrist emerge from the ambiguous *Ake* language: access to an independent, "neutral" psychiatric evaluation and an opportunity to discuss the examination with the psychiatrist prior to trial; and appointment of a partisan psychiatrist to aid the accused in presenting the insanity defense.

Access to a "Neutral" Psychiatrist. A strong case can be made that *Ake* requires only access to an independent psychiatric examination. First, the Court elected not to state directly that the defendant's right extended to a partisan psychiatrist, rather it chose to require "access" to a psychiatrist's assistance. While the use of the term "access" is not dispositive, the Court's reluctance to state that the psychiatrist should work as an advocate for the defense may have been purposeful. Second, the Court specifically restricted the defendant's right by excluding the "right to choose a psychiatrist of his personal liking or to receive funds to hire his own."[71] Finally, the Court chose flexible due process grounds as the basis for its decision rather than requiring assistance based upon equal protection or the right to effective assistance of counsel.[72] This implies a case-by-case analysis of the psychiatric assistance required by a particular defendant. Thus, the right to a partisan psychiatrist would be required only in compelling cases.

Recent decisions of the Court of Military Appeals suggest adoption of this analysis. In *United States v. Mustafa*,[73] the court held that an independent evaluation by a sanity board[74] comprised of three certified psychiatrists satisfied the requirements of *Ake* despite defense requests for a second board evaluation by a forensic psychiatrist or by a civilian forensic psychiatrist.[75] Although the court also noted that "[t]here is no showing in the record that the sanity of the appellant at the time of the offense was a significant factor at trial," the implication of the court's lengthy *Ake* analysis suggests that the court will uphold sanity board procedures as providing the accused with access to competent psychiatrists to present an insanity defense.

This implication may be supported by dicta in *United States v. Garries*.[76] While reviewing the accused's request for independent investigative assistance, the court made a broader reference to requests for expert witnesses under Rule for Courts-Martial 703(d)[77] stating, "In the usual case, the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial."[78] The court, however, went on to say that "[w]hen an accused applies for the employment of an expert, he must demonstrate the necessity for the services," and cited *Ake v. Oklahoma*.[79]

Finally, in *United States v. Davis*,[80] the Navy-Marine Corps Court of Military Review held that sanity board procedures satisfied the *Ake* standard. The examining psychiatrist testified that the accused suffered from a personality disorder and not a mental disease or defect.[81] The defense requested further psychiatric evaluation, claiming that the first evaluation misdiagnosed the accused's mental illness and that her condition had changed since the board's evaluation.[82] The court held that this unsubstantiated hypothesis failed to meet the burden of establishing the

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[69] The *Ake* Court stated specifically, "when the defendant is able to make an ex parte threshold showing to the trial court," the right to psychiatric assistance is apparent. 470 U.S. at 86.

[70] Several federal courts have held that simply raising the insanity defense is not enough. *See, e.g.*, Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986) (defendant's insanity defense alone did not raise the issue sufficiently at trial); Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986) (merely raising the insanity defense on date of trial did not support access to psychiatric assistance).

[71] 470 U.S. at 83.

[72] *See supra* note 28 and accompanying text.

[73] 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 444 (1986) (certiorari denied on other grounds). It is important to note that the *Mustafa* court reiterated that indigency is not a factor in the military. *Id.* at 169.

[74] *See* M.C.M., 1969, para. 121.

[75] *Mustafa*, 22 M.J. at 169.

[76] 22 M.J. 288 (C.M.A. 1986).

[77] *See supra* note 60 and accompanying text.

[78] *Garries*, 22 M.J. at 290–91.

[79] *Id.* at 291.

[80] 22 M.J. 829 (N.M.C.M.R. 1986). *See supra* note 61 and accompanying text.

[81] *Id.* at 834.

[82] *Id.*

materiality and necessity of the requested expert's testimony.[83]

At least one federal circuit has adopted the view that access to "neutral" psychiatrists satisfies *Ake*. In *Glass v. Blackburn*,[84] the Fifth Circuit held specifically that the defendant's psychiatric evaluation by a court-appointed sanity commission, which concluded that the defendant was probably sane at the time of the offense, satisfied the *Ake* standard. Glass' co-defendant had requested and obtained the services of a state-funded independent psychiatrist. While Glass could also have requested such assistance, the court ruled that such additional assistance exceeded the requirements of *Ake*.[85]

The Eleventh Circuit has also addressed the adequacy of a state lunacy commission. In *Magwood v. Smith*,[86] six doctors examined the defendant. The three-member state lunacy commission concluded that the defendant was insane at the time of their examination and was probably insane at the time of the offense. Another psychiatrist also testified that Magwood suffered from paranoid schizophrenia, but probably knew the difference between right and wrong. Thus, four psychiatrists testified favorably for the defense, and the court held that this satisfied the requirements of *Ake*.[87]

Right to a Partisan Psychiatrist. Despite the above analysis, the language of *Ake* strongly suggests that the state must supply the qualifying defendant with a psychiatrist specifically to aid in the preparation of the insanity defense. First, the Court reaffirmed that indigent defendants were entitled "to an adequate opportunity to present their claims fairly within the *adversary system.*"[88] Throughout the analysis, the Court consistently referred to the importance of the jury's factfinding role in evaluating differences in psychiatric testimony "on the basis of the evidence offered by *each party*,"[89] and that the psychiatrists for *each party* enable the jury to make its most accurate determination of the truth of the issue before them."[90]

Second, the Court recognized the inexact nature of psychiatry and emphasized that no single, accurate psychiatric conclusion on legal sanity was possible.[91] The Court thus rejected the notion that a "neutral" psychiatric evaluation resolved the issue of the defendant's sanity. It is important to note that the Court referenced a critical essay on the myth of impartial psychiatric experts.[92]

Considerable empirical evidence on the use of "impartial" experts has demonstrated that the trier of fact almost always simply adopts the expert's opinion because the expert is far more knowledgable on the subject than the judge or jury.[93] Thus, the actual trier of fact shifts from the judge or jury to the expert, undermining the adversary system hailed by the *Ake* Court.

Third, in requiring access to a competent psychiatrist, the Court did not limit the right to an independent evaluation, but extended the psychiatric assistance to "*assist* in evaluation, *preparation*, and *presentation of the defense.*"[94] In another portion of the analysis the Court stated:

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to *help* determine whether the insanity defense is viable, to present testimony, and to assist in *preparing the cross-examination of a State's psychiatric witnesses*, the risk of an inaccurate resolution of sanity issues is extremely high.[95]

It is difficult to imagine a "neutral" psychiatrist assisting the defense in preparing his own cross-examination. The Court also described the fiscal burden of the state as "limited to provision of one competent psychiatrist."[96]

Fourth, Justice Rehnquist was concerned that the majority opinion mandated a partisan psychiatrist when he stated in closing:

> [E]ven if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense.*" . . . A

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[83] *Id.* The *Davis* court confused the analysis of *Ake*. First, the court erroneously cited *Baldi* as Justice Marsall's illustration of the need for psychiatric testimony, highlighting that *neutral* psychiatrists had examined the defendant in that case. *Id.* at 833. As explained earlier, *Ake* took great pains to *distinguish* the *Baldi* decision and essentially overruled it. According to the Court, *Baldi* "was addressed to altogether *different* variables, and that we are *not limited by it* in considering whether fundamental fairness today requires a *different* result." 470 U.S. at 85 (emphasis added). Second, the *Davis* court denied the accused's request for further psychiatric evaluation because she failed to demonstrate a threshold showing of materiality and need. Yet the court had already stated that the accused had satisfied the requisite threshold showing that her sanity was a significant factor at trial. *See supra* note 61 and accompanying text. Perhaps the court's position can best be described as requiring the accused to demonstrate that her sanity board was conducted improperly or raised a serious question as to her sanity at the time of the offense, or the sanity board procedures satisfy *Ake*. It seems that this analysis actually suggests that Davis failed to demonstrate that her sanity was seriously at issue in the first place.

[84] 791 F.2d 1165 (5th Cir. 1986).

[85] *Id.* at 1169.

[86] 791 F.2d 1438 (11th Cir. 1986).

[87] *Id.* at 1443.

[88] *Ake*, 470 U.S. at 77 (quoting Ross v. Moffit, 417 U.S. 600, 612 (1974)) (emphasis added).

[89] *Id.* at 81 (emphasis added).

[90] *Id.* (emphasis added).

[91] *Id.* at 83.

[92] *Id.* at 83 n.7. (citing Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 Law & Psychology Rev. 99, 113–114 (1976)).

[93] *See Expert Services, supra* note 54, at 1350 n.160 (discussing studies on the effects of "impartial" expert psychiatric testimony).

[94] *Ake*, 470 U.S. at 83 (emphasis added).

[95] *Id.* at 82 (emphasis added).

[96] *Id.* at 80.

psychiatrist is not an attorney, whose job it is to advocate. . . . Although [an] independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a "defense" advocate. [97]

One federal circuit has adopted this "partisan" approach. In *United States v. Sloan*, [98] The Tenth Circuit held that when the sanity of the defendant was likely to be a substantial issue at trial, the trial judge must, upon request, appoint a psychiatrist to assist the defense. The testimony of a court-appointed psychiatrist that the defendant was competent to stand trial was insufficient. The court reasoned that "[t]he essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." [99]

In *United States v. Crews*, [100] the court's analysis was even clearer. Crews had been evaluated by two court-appointed and two treating psychiatrists, and their reports were received in evidence. The court held that Crews was entitled to a state-funded psychiatrist to interpret the findings of the expert witnesses, aid in preparation of cross-examination, and otherwise aid the defense in preparation for trial. [101]

The Tenth Circuit treatment of the *Ake* due process requirement appears consistent with the strong language of the case. Military trial counsel confronted with a defense request for psychiatric assistance beyond that provided by a sanity board should consider the analysis of *Sloan* and *Crews*, and weigh the burden of providing the requested assistance and the likely impact at trial against the risk of having the request approved on appeal. This balancing by trial counsel is particularly important in light of the recent changes to the Uniform Code of Military Justice, Article 50a, which shifts the burden of proof of the insanity defense to the accused. [102]

The Probable Effect of Insanity Defense Reform

In 1984, Congress significantly altered the substantive law and procedural rules surrounding the insanity defense by passing the Insanity Defense Reform Act. [103] The military followed suit in 1986 with the new Article 50a. [104] For the purposes of this article, the most significant change to the insanity rules was the reallocation of the burden of proof. Previously, once the issue was raised by the defense, the prosecution bore the burden of proving the accused's sanity beyond a reasonable doubt. [105] Under Article 50a, insanity is an affirmative defense and the burden of proof has shifted to the defense to prove insanity by clear and convincing evidence. [106]

This shift in the burden of proof is likely to affect the rights of indigent defendants to psychiatric assistance under *Ake*. One of the six factors listed by Justice Marshall to show that Ake's sanity was a significant factor at trial was that Oklahoma recognized the sanity defense and "the initial burden of producing evidence falls on the defendant." [107] Under the applicable Oklahoma law and judicial decisions, there was a presumption of sanity that remained until the defendant sufficiently raised a reasonable doubt as to his sanity at the time of the offense. Then, the burden shifted to the prosecution to prove the defendant's sanity beyond a reasonable doubt. [108] This process resembled the military standard *before* Article 50a was passed. If the burden of raising a reasonable doubt as to sanity was a relevant factor in the *Ake* analysis, the burden of proving insanity by clear and convincing evidence logically must be a stronger one. [109]

Conclusion

The above analysis of the Supreme Court's decision in *Ake v. Oklahoma* and the federal and military cases that have applied it raise several conservative suggestions for military counsel. First, the mere assertion of the insanity defense fails to satisfy *Ake's* threshold showing that the accused's sanity at the time of the offense will be a significant factor at trial. Defense counsel must also investigate the accused's background and behavior patterns to determine if the accused has a history of treatment for mental illness, uses antipsychotic drugs, or exhibits unpredictable or bizarre behavior. Next, the defense must provide this evidence to the convening authority, or military judge, and request expert psychiatric assistance under R.C.M. 703(d) and *Ake*. If this request is denied, the defense should request a preliminary sanity inquiry or a sanity board under R.C.M. 706. If the sanity inquiry reveals significant evidence of any mental disorder, the defense should renew its request for psychiatric assistance to prepare for trial. If psychiatrists testify for the government at trial, the defense counsel should again request expert psychiatric assistance, raising not only the due process requirements of *Ake*, but also the equal protection and sixth amendment issues averted by the Court.

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[97] *Id.* at 91 (Rehnquist, J., dissenting) (emphasis in original).

[98] 776 F.2d 926 (10th Cir. 1985); *see supra* note 65 and accompanying text.

[99] *Id.* at 929.

[100] 781 F.2d 826 (10th Cir. 1986).

[101] *Id.* at 831.

[102] *See supra* note 12 and accompanying text.

[103] 18 U.S.C. § 20 (Supp. III 1985); *see supra* note 11.

[104] U.C.M.J. art. 50a; *see supra* note 12.

[105] R.C.M. 916(b) analysis, at A21–57.

[106] U.C.M.J. art. 50a(b). The courts have upheld the constitutionality of shifting the burden of proof of insanity to the defense. United States v. Amos, 803 F.2d 419 (8th Cir. 1986); *see also* Martin v. Ohio, 107 S. Ct. 1098 (1987) (upholding shifting of burden in self defense cases with favorable reference to insanity defense reform.)

[107] 470 U.S. at 86.

[108] *Id.* at 74 n.1.

[109] Research revealed no federal or military cases that applied the *Ake* analysis under the new insanity defense reforms.

Second, the most logical analysis of *Ake* suggests that when an accused's sanity will be a significant factor at trial, he or she is entitled to psychiatric assistance beyond the "neutral" sanity board procedures. This threshold showing also satisfies the "relevant and necessary" requirements of R.C.M. 703(d) because *Ake's* due process right to psychiatric assistance mandates it.

Third, while the Court of Military Appeals suggested in *United States v. Mustafa* that military sanity board procedures satisfied the *Ake* standard, insanity was not considered a significant factor in that trial, and *Mustafa* was decided before passage of Article 50a.

Finally, if a defendant's sanity at the time of an offense is seriously at issue, the careful trial counsel will support the defense's request for expert psychiatric assistance to avoid the constitutional issue on appeal. The psychiatric assistance can be provided by medical assets at the installation or elsewhere within the Army. Because the defense bears the burden of proof of insanity, the provision for psychiatric expertise is not only fair, but it is also not likely to affect the outcome at trial if impartial psychiatrists have evaluated the accused and found him sane at the time of the offense.

Buying, Selling, and Renting the Family Home: Tax Consequences for the Military Taxpayer After the 1986 Tax Reform Act

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Introduction

The single most important asset for most military taxpayers is the family home. Due to the nature of military service, homes are often bought, sold, and sometimes leased several times during a military career. Careful tax planning should take place before engaging in these transactions to avoid tax pitfalls and to take full advantage of tax benefits available to homeowners.

This article introduces the reader to the basic tax consequences associated with buying, selling, and renting the personal residence. It will discuss changes made by the 1986 Tax Reform Act[1] that impact on taxation of residential property and will highlight special Code provisions affecting members of the Armed Forces engaged in real estate transactions.

The article focuses on the home used as a personal residence. The special tax rules and issues relating to vacation homes and homes used for business purposes will not be addressed.

Purchasing and Maintaining the Residence

The Home Mortgage Interest Deduction

Although the 1986 Tax Reform Act made sweeping changes to many areas of our tax laws, most of the features of the 1954 Internal Revenue Code[2] which make homeownership attractive from a tax standpoint have been retained. The 1986 Act retains the most important tax benefit of home ownership for most taxpayers: the deduction allowed for interest on home mortgage loans.[3] Thus, interest that is paid or accrued during the tax year on an indebtedness secured by property constituting a "qualified residence" is fully deductible.[4] A qualified residence can be the taxpayer's "principal residence" or a second residence that meets the criteria for vacation homes under Code section 280A.[5]

Although mortgage interest is deductible, the 1986 Act places an important limitation on the amount of the debt qualifying for the deduction. The interest deduction will be limited, for those mortgages incurred after 16 August 1986, to the amount attributable to the indebtedness up to the

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[1] Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat. 2085 (1986) [hereinafter 1986 Act]. For a general overview of the Tax Reform Act, see IRS Publication 553, Highlights of the 1986 Tax Changes (Rev. 1986). A more comprehensive treatment of the Act is contained in The Research Institute of America, The RIA Complete Analysis of the '86 Tax Reform Act (1986). *See also* A Complete Guide to the Tax Reform Act of 1986 (1986) (published by Prentice Hall); Nixon, Hargrave, Devans & Doyle, *The Tax Reform Act of 1986* (1986) (published by the American Law Institute-American Bar Association).

[2] The 1986 Tax Reform Act redesignates the 1954 Code as the Internal Revenue Code of 1986, but retains the basic structure of the 1954 Code. 1986 Act § 2.

[3] I.R.C. § 163(h) (West Supp. 1987) *as added by* 1986 Act § 511. The 1986 Act, however, eliminates the deduction for personal interest for tax years beginning after 31 December 1986. The disallowance is phased in over five years; in 1987, 35% of personal interest is nondeductible, 60% in 1988, 80% in 1989, 90% in 1990, and 100% in 1991. I.R.C. § 3163(h)(1), *as amended by* 1986 Act § 511(b).

[4] I.R.C. § 163(h) (West Supp. 1987).

[5] The principal residence is one that would qualify for nonrecognition of gain under section 1034, I.R.C. § 1034(a) (1982). *See* I.R.C. § 163(h)(3)(A) (West Supp. 1987). It could be a home, a boat, a housetrailer, a condominium, or a share in a cooperative apartment (*see infra.* notes 62–64 and accompanying text for a discussion of the concept of a principal residence). A vacation home under section 280A is a residence used by a taxpayer for the greater of 14 days or ten percent of the number of days the property is rented out. I.R.C. § 280A (1982); I.R.C. § 163(h)(5)(A)(iii) (West Supp. 1987). A taxpayer may choose which residence qualifies as his principal residence if he maintains two or more homes.

original cost of the home plus amounts spent for improvements (cost basis of the home).[6] An exception to this rule allows taxpayers incurring a debt after 16 August 1986 to also deduct interest attributable to the amount of the loan used for medical and educational expenses, so long as it does not exceed the fair market value of the home.[7] Another exception applies to home mortgages incurred prior to 16 August 1986; interest attributable to the indebtedness on these loans will be deductible even if the balance exceeds the taxpayer's cost basis.[8] The basis for purposes of determining the interest limitation is computed without taking into account the adjustments to basis by operation of Code sections 1033 (involuntary conversions) and 1034 (rollovers.)[9]

The new qualified residence interest deduction limitation could have a significant impact on taxpayers intending to borrow against the equity in their homes. The amount of interest paid on any debt secured by the principal residence which exceeds the taxpayer's cost basis and qualified medical and educational expenses will be considered as nondeductible personal interest.[10] On the other hand, if the mortgage debt is substantially lower than the basis, the taxpayer can obtain a second mortgage or "home equity credit loan" in an amount equalling the cost basis and still be entitled to a full interest deduction on the entire loan.[11] Before taking out these loans, however, taxpayers should consider the actual costs of refinancing, including set-up fees, points, and finance charges. Moreover, as the consumer interest deduction will be phased out over a five-year period,[12] it may not be advantageous from a tax standpoint to pay off consumer loans with home equity loans for the next few years.

Military personnel continue to be entitled to a full deduction for qualified residence interest (subject to the qualified debt ceilings).[13] The 1986 Act includes a special provision permitting service members a full deduction for mortgage interest and real estate taxes even though they receive a tax-free military housing allowance.[14]

Deduction of Other Items

The 1986 Tax Reform Act did not change most of the tax rules relating to deduction of expenses incurred in buying and maintaining a personal residence. For the most part, Congress left intact the general principle that the expenses incurred in buying a home are nondeductible personal living expenses.[15]

Therefore, the miscellaneous expenses incurred to purchase a house, including closing costs and other charges such as appraisal fees, legal expenses, and title fees, will not qualify for deduction.[16] Deductions are also unavailable for state and local taxes imposed on the transfer of real estate used as a personal residence.[17] These expenses may be deducted as moving expenses, however, if the purchase was associated with a job transfer.[18] If these expenses do not qualify for the moving expense deduction, they may be treated as capital expenditures and added to the taxpayer's basis in the property.[19]

The fees and charges paid to a lender of purchase money mortgages for such services as loan processing, credit checks, and title examinations, do not represent interest and are not deductible.[20] This includes "the point" paid by purchasers using a Veteran's Administration (VA) loan guarantee as a "loan origination fee" and other "points" paid as fees for specific services.[21] The expenses of obtaining a mortgage are also not considered part of the cost of obtaining property and thus are not added to the taxpayer's basis.[22]

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[6] I.R.C. § 163(h) (West Supp. 1987).

[7] I.R.C. §§ 163(h)(5)(A)(i), (h)(3)(B)(ii), and (h)(4) (West Supp. 1987). Qualified medical expenses are those amounts paid for the medical care of the taxpayer, his wife, and dependents. I.R.C. § 163(h)(4)(B) (West Supp. 1987). Qualified educational expenses are those reasonably incurred for the education of the taxpayer, his wife, or a dependent. It includes tuition and reasonable living expenses while attending an educational institution away from home. I.R.C. § 163(h)(4)(c) (West Supp. 1987).

[8] I.R.C. § 163(h)(3)(c) (West Supp. 1987).

[9] I.R.C. § 163(h) (West Supp. 1987); Conference Report on the Tax Reform Act of 1986, H.R. Rep. No. 841, 99th Cong., 2d Sess. (1986), *reprinted in* Tax Reform Bill of 1986 (CCH), at II-155 [hereinafter Conf. Rep.]. *See infra* notes 81–96 and accompanying text for a discussion of the adjustments to basis taken by operation of section 1034 I.R.C. § 1033(b) and 1034(e) (1982).

[10] I.R.C. § 163(h) (West Supp. 1987).

[11] Taxpayers should consider refinancing homes up to the cost basis to pay off nondeductible consumer debts, especially once the consumer interest deduction has been phased out. The taxpayer will be entitled to claim the interest on the refinanced debt as qualified residence interest. I.R.C. § 163 (West Supp. 1987).

[12] I.R.C. 163(h)(1), *as amended by* 1986 Act § 511(b).

[13] I.R.C. § 265(6), *as added by* 1986 Act § 132(c).

[14] The full deduction for military personnel was in doubt prior to the 1986 Act. The Internal Revenue Service (IRS) ruled in 1983 that a minister's deduction for mortgage interest must be reduced to the extent that he received a rental allowance from the church. Rev. Rul. 83-3, 1983-1, C.B. 72. The IRS proposed to extend this disallowance to military personnel receiving housing allowances.

[15] I.R.C. § 212 (West Supp. 1987).

[16] Treas. Regs. §§ 1.263(a)-2 and 1.102-1(b) (1985); Estate of Bray v. Commissioner, 46 T.C. 577 (1986), *aff'd*, 396 F.2d 452 (6th Cir. 1968). This general rule does not apply, of course, to homes held for trade or business or for the production or income. *See* I.R.C. §§ 162, 167, 168, and 212 (West Supp. 1987).

[17] Treas. Reg. § 1.164-3(e)-(g) (1956).

[18] IRS Publication 521, Moving Expenses (Rev. 1986).

[19] Rev. Rul. 65-313, 1965-2 C.B. 47, *modifying* Rev. Rul. 62-149, 1962-2 C.B. 66. Taxpayers qualifying to take these purchase-related expenses as moving deductions may elect instead to add the expenses to the basis of the new home and reduce the amount of gain realized on the eventual sale.

[20] I.R.C. § 262 (West Supp. 1987). *See generally*, Pyrz, *Deductibility of Mortgage Expenses by the Military Homeowner After Revenue Ruling 83-3*, 102 Mil. L. Rev. 109 (1983).

[21] This "point" has been construed as a nondeductible fee for specific services. Dozier v. Commissioner, 44 T.C.M. (CCH) 1274 (1982); Rev. Rul. 67-297, 1967-2 C.B. 87.

[22] Gibbons v. Commissioner, 35 T.C.M. (CCH) 565 (1976). These expenses do not therefore have any tax consequences.

On the other hand, "points" paid as prepaid interest to secure a purchase money mortgage are deductible by the buyer.[23] To be eligible for deduction as interest, these points must be actually paid in lieu of higher interest rates as compensation for the loan, and not as fees for services.[24] The general rule is that points must be amortized over the life of the loan. There is an exception for points paid to obtain mortgages to purchase or improve the principal residence.[25] Under this circumstance, the purchaser may fully deduct points paid in the year of purchasing the residence.[26] Points paid to refinance a mortgage, however, will not be entirely deductible in the year paid even if the mortgage is secured by the taxpayer's principal residence.[27]

A homeowner may also deduct state, local, and foreign real property taxes paid on the residence during the tax year.[28] In the year of purchase, the deduction must be allocated between the buyer and seller because the buyer may only deduct taxes accruing after the date of sale.[29]

With the exception of real estate taxes and qualified residence interest, almost all of the expenses of maintaining a home are considered nondeductible personal and family living expenses.[30] Therefore, a homeowner is not allowed to claim a deduction for items such as mortgage principal payments, costs incurred in repairing and maintaining a home, utilities fees, and insurance premiums.[31]

Moving Expenses

A modification to the method for taking moving expenses in the Tax Reform Act of 1986 will have a significant impact on most military taxpayers who formerly could deduct unreimbursed expenses incurred in buying a home as moving expenses. Prior to 1986, the Code provided an "above the line" deduction from gross income for expenses paid or incurred in making employment related moves.[32] Under the Act, however, moving expense deductions after tax year 1986 will be available only to those who itemize deductions.[33]

Despite this major change in the method for claiming the deductions, Congress has left intact the statutory treatment of moving expenses under section 217.[34] Under this section, taxpayers may deduct the reasonable expenses of making employment-related moves from one location to another.[35] Deductible expenses include the cost of moving household goods and effects, in-transit storage, travel to the new home, pre-move house-hunting trips, and temporary living expenses for up to thirty days.[36]

The Code also allows a deduction for "qualified real estate expenses" including certain costs of selling a principal residence and purchasing a new one.[37] Purchase related expenses such as attorney, escrow, and title fees, and "points" *not* representing payment or prepayment of interest are deductible as moving expenses.[38] Expenses incurred in selling a former home, including state transfer taxes, attorney and title fees, real estate commissions, and points or loan placement charges paid are also deductible moving expenses.[39]

There are some limits on the scope of real estate expenses that will qualify for moving expense deductions. A loss on the sale of a former residence is not deductible.[40] Moreover, a taxpayer cannot deduct as a moving expense the cost of improvements made to enhance the appearance of the home.[41]

Note also that the Code prevents taxpayers from enjoying a "double tax benefit."[42] Thus, the expenses in buying a home may not be added to the basis of the home if

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[23] I.R.C. § 461(g)(2) (1982). Points paid by the seller, however, are not deductible. These points are considered as costs of selling the property and reduce the amount realized on the sale of the property. *See* I.R.C. § 1001 (1982); Rev. Rul. 80–319, 1980–2 C.B. 252; Rev. Rul. 68–650, 1968–2 C.B. 79.

[24] Rev. Rul. 69–188, 1969–1 C.B. 54.

[25] I.R.C. § 461(g)(2) (1982).

[26] Under section 461, the payments of points must be an "established business practice in the area in which the indebtedness is incurred," and the taxpayer must not pay more than what is generally charged in the area. I.R.C. § 461(g)(2) (1982). If more points are paid than is generally charged in the area, the taxpayer may deduct only the points generally charged. *See generally* IRS Publication 545, Interest Expense (Rev. 1986).

[27] Rev. Rul. 67–297, 1967–2 C.B. 87; Rev. Rul. 68–650, 1968–2 C.B. 78. *See generally* IRS Publication 545, Interest Expense (Rev. 1986).

[28] I.R.C. § 164(a)(1) (1982); Treas. Reg. § 1.164–3(b) (1956).

[29] I.R.C. § 164(a)(1) (1982); Treas. Reg. § 1.164–3(b) (1956).

[30] I.R.C. §§ 262 and 263 (1982 & West Supp. 1987).

[31] I.R.C. §§ 262 and 263 (1982 & West Supp. 1987). *See* Rev. Rul. 75–159, 1975–1 C.B. 95; Miller v. Commissioner, 40 T.C.M. (CCH) 245 (1980).

[32] Prior to 1986, moving expenses were deductible from gross income in computing adjusted gross income, under I.R.C. § 62(8) (1982). *See* I.R.C. § 217 (1982).

[33] 1986 Act § 132(c) (amending I.R.C. § 62) effective for tax years beginning after December 1986. Moving expense deductions will not, however, be subject to the two percent of adjusted gross income floor for business related deductions. 1986 Act § 132(a).

[34] I.R.C. § 217 (1982).

[35] *Id.*

[36] I.R.C. § 217(b)(1)(A) (1982) (household goods moving expenses); I.R.C. § 217(b)(1)(B) (1982) (travel expenses including the cost of transportation, meals, and lodging for one trip from old residence to new home); I.R.C. § 217(b)(1)(C) (1982) (pre-move house hunting expenses including transportation, meals, and lodging); I.R.C. § 217(b)(1)(D) (temporary living expenses).

[37] I.R.C. § 217(b)(2) (1982). There are four types of qualified residence expenses: sale or exchange of former residence; purchase of a new residence; settlement of unexpired lease; and acquisition of a lease.

[38] IRS Publication 521, Moving Expenses (Rev. 1986).

[39] *Id.*

[40] Treas. Reg. § 1.217–2(b)(7) (1976). For example, I.R.C. § 217(c) (1982) prohibits a reduction of the amount realized on the sale of the old residence for expenses deducted as moving expenses.

[41] "Fix up" expenses to improve salability of the old home are specifically nondeductible, and must be subtracted from the amount realized. Treas. Reg. § 1.217–2(b)(7) (1976).

[42] I.R.C. § 217(e) (1982).

they have also been claimed as moving expenses. Similarly, the costs of selling or exchanging a home cannot be taken as a moving expense deduction and also used to reduce the amount realized on the transaction.

To qualify for moving expense deductions, most taxpayers must meet a distance and length of employment test and a commencement of work standard.[43] The minimum duration of work and distance conditions are waived for active duty members of the Armed Forces who move pursuant to permanent change of station orders.[44]

Service members may not deduct moving expenses that have been reimbursed by the government or the cost of moving services paid for or provided by the government.[45] Accordingly, the amount of unreimbursed, deductible moving expenses will not usually be sufficient for the average military taxpayer to itemize deductions in lieu of taking the new generous standard deductions.[46] Thus, unless a soldier has other substantial deductions justifying an itemized return, such as mortgage interest, unreimbursed moving expenses may well be effectively lost for income tax adjustment purposes after 1986.

Sale of the Personal Residence

Capital Gains

The gain derived from the sale or exchange of residential property is subject to tax as a capital asset. Prior to the Tax Reform Act of 1986, these gains were eligible for an income tax deduction of up to sixty percent.[47] The 1986 Tax Reform Act repeals this favorable long term capital gains deduction.[48] Consequently, after 1987, all net long term capital gains, including the gain derived from the sale of a personal residence, will be taxed at the same rates as ordinary income.[49] Thus, the nonrecognition of gain (rollover) provisions of the Code will take on increasing significance to military taxpayers.

Capital Losses

Losses sustained on the sale of a personal residence are treated as nondeductible living expenses under the Code.[50] Moreover, because these losses are not deductible, they are not long term capital losses and may not be used to offset long term capital gains.[51] These capital loss rules do not apply if the family residence has been converted to property held for the production of income prior to sale.[52] Thus, if the fair market value of the home has dropped below the taxpayer's basis, or if the housing market is severely depressed, the taxpayer should consider converting the home to an income-producing rental property instead of selling. After making this conversion, the taxpayer could deduct net long term capital losses resulting from the sale of the property from ordinary income.[53] Moreover, expenses relating to the converted property, including depreciation and insurance, could be deducted from ordinary income in the tax years prior to sale.[54]

Deferral of Gain: Section 1034

There are two exceptions to the general rule that capital gain from the sale of a principal residence is taxable in the year of sale. The first exception allows persons who are fifty-five or older to elect to exclude from taxable income, on a once in a lifetime basis, up to $125,000 of the gain from the sale of the residence.[55] The second exception, provided under section 1034 of the Code, is that gain on the sale of a principal residence will not be recognized in the year of sale if, within a specified replacement period, a new residence is purchased at a cost exceeding the price of the old residence.[56] If the requirements of section 1034 are met, deferral of gain is mandatory; a taxpayer cannot elect to pay a tax on the recognized gain.[57]

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[43] The taxpayer's principal place of work must be at least 25 miles further from his former residence than was his old principal place of work. I.R.C. § 217(c)(1)(A) (1982). The taxpayer must have been employed for at least 39 weeks during the 12 month period preceding the move and the expenses must have been incurred within one year from the commencement of work. I.R.C. § 217(c)(2) (1982).

[44] I.R.C. § 217(g)(1) (1982).

[45] I.R.C. § 217(g) (1982). The cash reimbursements are not included in the member's gross income. *See* I.R.C. § 217(g) as added by § 506(c) 1986 Act. The member may claim a deduction to the extent he or she did not receive reimbursement for expenses.

[46] The 1986 Act replaces the zero bracket amount with a generous basic standard deduction. For example, married taxpayers filing jointly receive a standard deduction of $3760 in 1987, increasing to $5000 in 1988. I.R.C. § 63 *as amended by* 1986 Act § 102(a).

[47] Under I.R.C. § 1202 (1982), taxpayers could deduct from gross income 60% of their capital gains (excess of net long-term capital gain over net short-term capital loss). The remaining 40% of the net gain was included in regular income and was taxed at the regular brackets.

[48] I.R.C. § 1202, *repealed by* 1986 Act § 1301; I.R.C. § 170, *amended by* 1986 Act § 301. The 1986 Act, however retains the distinction between ordinary income and losses and capital gains and losses to facilitate later possible reinstatement of the capital gains exclusion.

[49] 1986 Act § 302(a). In 1987, net capital gains will be treated as regular income and taxed at the lesser of the applicable tax bracket or 28%. Beginning in 1988, the tax applicable to some or all of capital gains will be at the higher 33% rate if the taxpayer is in that bracket. I.R.C. §§ 1 and 1211, *as amended by* 1986 Act §§ 302 and 311.

[50] I.R.C. § 262 (1982); Treas. Reg. § 1.262(1)(b)(4) (1985); I.R.C. § 165(c) (1982); Treas. Reg. § 1.165–9(9) (1956).

[51] I.R.C. § 1222(7) (1982); Koehn v. Commissioner, 16 T.C. 1378 (1951).

[52] I.R.C. § 165(c)(1) (West Supp. 1987). *See infra* notes 105–123 and accompanying text for a discussion of conversion of a family residence to income-producing rental property.

[53] To compute the loss, the taxpayer must use the lesser of the adjusted basis for the property or the fair market value at the time of the conversion. Treas. Regs. § 1.165–9(b)(2) (1956); Walden Sweet v. Commissioner, 68–2 U.S.T.C. 9656 (N.D. Cal. 1968).

[54] I.R.C. § 212 (1982).

[55] I.R.C. § 121 (1982). To qualify for this exclusion, the taxpayer must have owned and occupied the home for three of the five years preceding the sale. Unlike section 1034, this exclusion applies only if elected by the taxpayer and, once used, it is not available for subsequent transactions. *See* Gately, *When Should a Taxpayer Use the Once In a Lifetime Section 121 Election?*, 12 J. Real Est. Tax 38 (1984).

[56] I.R.C. § 1034 (West Supp. 1987). Section 1033 provides a similar deferral of gain exception for homes which have been involuntarily converted by condemnation, destruction, or seizure. I.R.C. § 1033 (1982).

[57] I.R.C. § 1034 (West Supp. 1987).

Deferral of gain under section 1034 is available only if a new "replacement" home is purchased and resided in within a four-year period beginning two years before and ending two years after the old residence is sold.[58] The replacement period for members of the armed forces on extended active duty is suspended up to a maximum of four years after the date of sale of the old residence.[59] Additional time is available for service members who are stationed overseas, or who, after returning from overseas tours, are required to reside in on-post quarters because adequate off-post housing is not available.[60] In these instances, the replacement period does not expire until one year after the last day the member is stationed outside the United States, or one year after the member is no longer required to reside on-post, but in either case, no longer than eight years after the date the old residence was sold. Unfortunately, the Act does not provide an extension for soldiers returning from overseas duty who are ordered to live on-post because of a surplus of government quarters or because of duty assignment.

The nonrecognition of gain provisions of section 1034 apply only if the former home and the replacement residence are the taxpayer's "principal residence."[61] This term has been construed to encompass houseboats, housetrailers, condominiums, and shares held in housing cooperatives, as well as the residential home physically occupied by the taxpayer.[62] Whether a home is a principal residence is determined by reference to all the facts and circumstances, including the taxpayer's good faith efforts to establish the character of a residence as a home.[63] A taxpayer may only have one "principal residence" at any time for purposes of section 1034.[64] Thus, if more than one residence is purchased during the prescribed replacement period, only the last home purchased is treated as a replacement home under section 1034, unless the multiple purchase was the result of a work-related move.[65] A U.S. citizen is entitled to deferral of gain tax treatment under section 1034 even if the old residence or the new, or both, are located in a foreign country.[66]

A question frequently litigated, and an area of concern to military homeowners, is whether a former home can qualify as a principal residence under section 1034 even though it is rented and not occupied by the taxpayer immediately prior to the sale. It is fairly well established that the old and new residence need not be occupied at all times.[67] Thus, the temporary rental of a former home will not necessarily disqualify it for deferral of gain treatment. The Tax Court, however, has developed the general rule that the taxpayer must actually occupy the old residence within the statutory replacement period to postpone gain under section 1034.[68] Two exceptions to the "actual occupancy" rule have been developed in a series of cases.[69]

The first exception applies when the taxpayer moves out of the home temporarily with the intention of returning, but then later sells the home due to unanticipated change of circumstances.[70] Although the taxpayer may lease the home during this extended period, the facts and circumstances must clearly show that the taxpayer's primary intention was to return to the home.[71] Thus, military taxpayers who

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[58] I.R.C. § 1034(a) (1982).

[59] I.R.C. § 1034(h)(1) (West Supp. 1987). This suspension is available even if the spouse who is not in the service owns the old residence, as long as both the spouse and the member use the old and new replacement residence as their principal residence. Treas. Reg. § 1.1034(1)(g)(2) (1956). The suspension of the replacement period will continue for a divorced spouse serving on active duty but ends for the nonservice divorced spouse. Rev. Rul. 78–136, 1978–1 C.B. 259.

[60] I.R.C. § 1034(h)(2) *as amended by* 1986 Act § 1878(g). This section provides:

(2) Members stationed outside the United States or required to reside in government quarters.—In the case of any taxpayer who, during any period of time the running of which is suspended by paragraph (1)—

(A) is stationed outside of the United States, or

(B) after returning from a tour of duty outside of the United States and pursuant to a determination by the Secretary of Defense that adequate off-base housing is not available at a remote base site, is required to reside in on-base Government quarters.

any such period of time as so suspended shall not expire before the last day described in subparagraph (A) or (B), as the case may be, except that any such period of time as so suspended shall not extend beyond the date which is 8 years after the date of the sale of the old residence.

(3) Extended active duty defined.—For purposes of this subsection, the term "extended active duty" means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.

[61] I.R.C. § 1034(a) (1982).

[62] I.R.C. § 1034(f) (1982) (approving cooperatives); Rev. Rul. 64–31, 1964–1 (Part I) C.B. 300 (approving condominiums); *see also* Treas. Reg. § 1.1034(c)(3)(i) (1956) (allowing houseboats and housetrailers).

[63] I.R.C. § 1034(a) (1982); Treas. Reg. § 1034–1(c)(3)(i) (1956); Evans v. Commissioner, 21 T.C.M. (CCH) 339 (1962).

[64] Rev. Rul. 66–114, 1966–1 C.B. 181; Rev. Rul. 77–298, 1977–2 C.B. 308. The IRS will not issue rulings concerning whether property qualifies as a principal residence. Rev. Proc. 85–22 § 3.016, 1985–1 C.B. 550.

[65] Rev. Rul. 66–114, 1966–1 C.B. 181; Rev. Rul. 77–371; 1977–2 C.B. 308. The work-related move exception to this rule applies when the geographic and length of employment tests for deducting moving expenses are met. I.R.C. § 217 (1982).

[66] Rev. Rul. 54–611, 1954–2 C.B. 159.

[67] Treas. Reg. § 1.1034–1(c)(3)(i) (1982).

[68] The "actual occupancy" rule was first articulated in Stolk v. Commissioner, 40 T.C.M. (CCH) 345 (1963), *aff'd*, 326 F.2d 760 (2d Cir. 1964). The rule was later applied in Houlette v. Commissioner, 48 T.C. 350 (1967).

[69] For a discussion of the development of these exceptions, see Baxter, *The Impact of Section 1034 of the Internal Revenue Code of 1954 on the Decision to Sell or Rent a Principal Residence When a Service Member is Reassigned*, The Army Lawyer, Oct. 1983, at 12; Hartwell, *Sale or Exchange of Personal Residence: Section 1034*, 31 Tax. L. Rev. 531 (1976).

[70] The exception was first recognized in Trisko v. Commissioner, 29 T.C. 515 (1957), where a taxpayer leased his home during a temporary overseas assignment. Although he intended to return to the home, rent control laws prevented him from reentering the property, so he purchased a new residence. The exception was again applied in a factually similar case, Barry v. Commissioner, 30 T.C.M. (C.C.H.) 575 (1971). In *Barry*, an Army officer leased his residence during two assignments with the intention of returning upon his retirement. Upon retirement, however, he accepted a job in another state and sold the old home. In both cases, the taxpayers were allowed to defer gain on the sale of the former home. *See also* Rev. Rul. 78–146, 1978–8 C.B. 260.

[71] *See Barry v. Commissioner.* Facts that assist in showing this intent are vacating the home due to job assignments, leasing for maintenance and not for profit, and rejecting offers to buy the home.

have rented their homes during reassignments to different duty locations could rely on this exception to defer gain on a subsequent sale if they intended to reoccupy the home after the temporary rental period.

A second exception to the actual occupancy rule exists when the taxpayer vacates the home with the intention of selling, but nevertheless leases it for a temporary period because of a poor real estate market.[72] A taxpayer relying on this exception should make periodic and diligent efforts to sell the home.[73] Taxpayers risk changing the character of a home from a personal residence to an income-producing property if the decision to rent is unrelated to exigencies in the real estate market.[74]

A former residence will also lose its character as a principal residence under section 1034 if the taxpayer leases the home for an extended period with no intention of returning.[75] Similarly, the old residence will not qualify as a principal residence under section 1034 if the taxpayer moves out or "abandons" the home with no intention of returning and establishes another home before buying a replacement home.[76]

The litigation concerning the occupancy requirements of the former residence has failed to produce clear and easy to apply rules.[77] Accordingly, taxpayers who intend to vacate their homes prior to sale should obtain professional tax advice to ensure that their homes remain eligible for deferral of tax on any recognized gain under section 1034.

In contrast to the rules for occupying the former home, the requirements relating to purchase and occupancy of the new home are clear. Both the IRS and the courts have strictly construed section 1034 to require actual purchase and occupancy of the new home within the statutory replacement period.[78] Thus, the time for buying and using the home will not be extended even if the delays were due to unexpected incidents or circumstances beyond the taxpayer's control.[79] The IRS has also strictly construed section 1034 to require selling the former home within two years from the date a new home is either purchased or constructed.[80]

Recognizing Gain on the Sale

Assuming that all of the basic requirements of section 1034 have been met, the extent to which a taxpayer will benefit from the section depends upon the results of several calculations.[81] First, the recognized gain on the sale of a principal residence must be determined by subtracting the taxpayer's adjusted basis in the old home from the amount realized.[82] The adjusted basis for the property is derived by adjusting the original cost by the cost of capital improvements, casualty losses, and the gain deferred, if any, from a prior sale.[83] The amount realized from the sale is the sale price minus selling expenses.[84] Selling expenses are all of the actual costs incurred in selling the home, including broker's commissions, legal fees, and most closing costs.[85]

The second calculation is to compare the adjusted sales price of the former house with the purchase price of the new home. Under section 1034, the gain realized on the sale is recognized for purposes of determining current tax liability only to the extent that the adjusted sales price of the old residence exceeds the purchase price of the new residence.[86] The adjusted sales price is determined by subtracting the expenses incurred in fixing-up the property from the amount realized.[87] This figure is compared to the cost of purchasing the new residence; a figure that includes the total of all acquisition, purchase, construction, reconstruction, and capital improvements costs incurred during the rollover period in connection with purchasing the

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[72] This exception was first formulated in Clapham v. Commissioner, 63 T.C. 505 (1975). In *Clapham*, the taxpayer leased the home for approximately one year after he unsuccessfully offered it for sale. The Tax Court allowed him to defer the gain because it concluded he had no other intention but to sell the property. A recent case applying the exception is Bolaris v. Commissioner, 776 F.2d 1428 (9th Cir. 1985). In *Bolaris*, the court permitted the taxpayer to defer gain on the sale of a home he had leased for several months after trying to find a buyer. *See also* Aagard v. Commissioner, 56 T.C. 191 (1971).

[73] *See, e.g.*, Houlette v. Commissioner, 48 T.C. 350 (1957).

[74] Crocker v. Commissioner, 34 T.C.M. (CCH) 1357 (1975), *aff'd*, 571 F.2d 338 (6th Cir. 1978).

[75] Houlette v. Commissioner, 48 T.C. 350 (1967) (Coast Guard officer leased home for six years before purchasing new residence in another state).

[76] Stolk v. Commissioner, 40 T.C. 345 (1963) (taxpayer vacated home and lived in a rented apartment for two years prior to purchasing a replacement property); *see also* Demeter v. Commissioner, 30 T.C.M. (CCH) 863 (1971); Steigler v. Commissioner, 23 T.C.M. (CCH) 412 (1964).

[77] Indeed, similar fact situations have led to different results. *Compare* Clapham v. Commissioner, 63 T.C. 509 (1975) *with* Houlette v. Commissioner, 48 T.C. 350 (1957).

[78] United States v. Sheahan, 323 F.2d 383 (5th Cir. 1983); Bayley v. Commissioner, 35 T.C. 288 (1960). A statutory extension is available, however, for newly constructed homes (I.R.C. § 1034(e)(5)), and involuntary conversions (I.R.C. § 1033 (1985)).

[79] *See, e.g.*, Bezzell v. Commissioner, 26 T.C.M. (CCH) 481 (1967) (confinement due to arthritis); Henzel v. Commissioner, 24 T.C.M. (CCH) 1344 (1965) (construction delays due to contractor negligence); Rev. Rul. 74–411, 1974–2 C.B. 70 (taxpayer absent from United States during replacement rules). Merely moving furniture will not be sufficient to constitute use of the property. Bayley v. Commissioner, 35 T.C. 288 (1960).

[80] Peck v. Commissioner, 44 T.C.M. (CCH) 1030 (1982).

[81] Section 1034 affects only the amount recognized on a sale; the amount realized is not affected. The determination of the amount realized is made principally by reference to section 1001. I.R.C. § 1001 (1982); Treas. Reg. § 1.1001–1(a) (1956).

[82] I.R.C. § 1001(a) (1982); Treas. Reg. § 1.1001–1(a) (1956).

[83] I.R.C. §§ 1011(a) and 1012 (1982).

[84] Treas. Reg. § 1.1034–1(b)(4)(ii) (1956). This includes all consideration received in the sale including cash and fair market value of other property.

[85] Rev. Rul. 55–380, 1959–2 C.B. 155; Martin v. Commissioner, 19 T.C.M. (CCH) 724 (1960).

[86] I.R.C. § 1034(a) (1982).

[87] I.R.C. § 1034(b)(i) (1982); Treas. Reg. § 1.1034–1(b)(3) (1956). Fixing-up expenses are limited to those incurred for work performed within 90 days before entering into the contract for sale, and which are paid on or before 30 days after the selling date. I.R.C. § 1034(b)(1) (1985). These expenses must be deducted from the sales price. They cannot be deducted from ordinary income. Cramer v. Commissioner, 55 T.C. 1225 (1971). Fixing-up expenses do not include expenditures for capital improvements. Treas. Reg. 1.1034–1(b)(6) (1956).

home.[88] Expenses such as title fees, insurance charges, commissions, legal expenses, and state transfer fees can also be added to the purchase cost if actually paid or incurred by the purchaser.[89] Some incidental expenses such as mortgage and fire insurance premiums, utility charges, and loan origination fees are neither added to the purchase cost nor deductible.[90] Capital improvements made to the new residence within the statutory replacement period can also be added to purchase cost.[91]

If the cost of the new home is more than the adjusted sales price of the old residence, all of the gain is not recognized and the basis of the new residence is reduced by this amount of the difference.[92] Conversely, if the cost of the new home is lower than the adjusted sales price of the old residence, the difference is recognized as gain.[93] This gain will be taxed under the new tax laws at the ordinary rate.[94] The basis of the new property will be reduced by the amount of the nonrecognized gain.[95] The cost of all subsequent capital improvements should be added to the basis of the property.[96]

An example showing how to compute realized gain and recognized gain in a typical sale and repurchase is at Appendix A of this article.

Reporting the Transaction

Information concerning the sale of a principal residence should be reported to the IRS even if all tax is deferred by operation of section 1034. If gain is recognized, the taxpayer should report the transaction using Internal Revenue Form 2119, Sale or Exchange of Principal Residence, and Schedule D, Capital Gains and Losses, Form 1040.[97] When a home is sold, Internal Revenue Form 2119, Sale or Exchange of Principal Residence, must be filed even if all gain is deferred, or if the taxpayer is unsure if he or she will purchase a replacement home.

Taxpayers should consider paying tax on the gain on the sale of a principal residence in the year of sale if they are uncertain about buying a replacement home to avoid assessment of interest and penalties if a home is not purchased. The tax paid on the gain can later be reclaimed if a replacement home is bought by filing an amended return with the three-year statute of limitations for filing an amended return.[98] The IRS has an unlimited time to make a deficiency assessment based on recognized, but unreported, gain from the sale of a principal residence unless the taxpayer triggers the running of a three-year statute of limitation by providing the Service with a special written notice.[99]

A new method of reporting home sales taking effect this year will make it easier for the IRS to ensure compliance with tax laws. Settlement agents for closings must file an information return with the Service describing the transaction that will be cross-referenced to the seller's return.[100] This new requirement will probably result in an additional fee for home sellers to pay at closing.[101]

Leasing the Personal Residence

Soldiers sometimes lease their homes because they are unable to sell the home for a fair price after receiving transfer orders. Others intentionally convert their former homes to rental property held for the production of income. Either situation gives rise to complex tax issues often involving the interplay of several Code provisions. The tax treatment of leasing residential property could also be significantly affected by changes in the Tax Reform Act of 1986 and a recent decision by the Ninth Circuit.[102]

Nonrecognition of Gain

The first major tax issue created by leasing a personal residence is to determine what impact the rental activity will have on the ability to defer gain under the provisions of section 1034. Recall that the temporary rental of a home prior to sale does not necessarily deprive it of its character as a principal residence for section 1034 purposes.[103] Even a temporary rental could disqualify a home for rollover treatment, however, if the taxpayer had no intention of returning to the home and the lease was not the result of a

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[88] I.R.C. § 1034(c)(2) (1982); Treas. Reg. § 1.1034–1(1)(c)(4)(i) (1956). The value of that part of the replacement residence acquired by gift or inheritance is not included. Treas. Reg. § 1.1034–1(c)(4)(i) (1956).

[89] Treas. Reg. § 1.1034(c)(4)(i) (1982). These expenses cannot be added to purchase cost of the new residence, however, if they were claimed as moving expense deductions under section 217. Treas. Reg. § 1.217–2(b)(7)(ii) (1956).

[90] Treas. Reg. § 1.1034–1(b)(7) (1956); Rev. Rul. 65–313, 1965–2 C.B. 47.

[91] I.R.C. § 1034(e) (1982). Capital improvements are those improvements that add value to, or increase the life of, the new residence. These should be distinguished from minor or routine repairs.

[92] I.R.C. § 1034(a) (1982); Treas. Reg. § 1.1034–1(a), (c) (1956). Thus, it is still necessary to compute the amount realized in order to determine the basis of the new home.

[93] I.R.C. § 1034(a) (1982); *see* Rosario v. Occhipanti, 28 T.C.M. (CCH) 978 (1969); Sterling v. Beckwich, 23 T.C.M. (CCH) 1537 (1964).

[94] I.R.C. § 170, *as amended by* 1986 Act § 301.

[95] I.R.C. § 1034(a) (1982).

[96] I.R.C. § 1011 (1982). Taxpayers should keep accurate records to support all adjustments in the basis of the home.

[97] Taxpayers should read IRS Publication 523, Tax Information on Selling Your Home (1986), prior to completing schedule D.

[98] I.R.C. §§ 1311–1314 (1982); *see* I.R.C. § 6213 (1982) and Treas. Reg. § 301.6402–2(b) (1977). An excellent article providing advice on when and how to recover taxes paid if a replacement residence is purchased is Baxter, *supra* note 69.

[99] I.R.C. § 1034(j) (1982). Under this exception to the normal three-year statute of limitations, the taxpayer must give the IRS notice of one of the following: the cost of purchasing a new residence; his intention not to replace the old home; or the failure to buy a new home in the replacement period to begin a three-year statute of limitations.

[100] I.R.C. § 6045(e), *added by* 1986 Act § 1521(a). This should be accomplished by using IRS Form 1099.

[101] *Selling a House? The I.R.S. Is Watching,* Consumer Reports, Aug. 1987, at 508. The new procedure should not affect home buyers.

[102] Bolaris v. Commissioner, 776 F.2d 1428 (9th Cir. 1985), *rev'g* 81 T.C. 840 (1983).

[103] *See supra* text accompanying note 67.

poor real estate market.[104] Because the tax rules that have developed in this area are complex and uncertain, taxpayers should obtain professional tax advice prior to leasing their homes. The need for careful planning from the beginning is especially critical because the gain on the eventual sale of a leased home that will be recognized if the house has lost its character as a principal residence and therefore not eligible for section 1034 rollover treatment will be taxed at the ordinary tax rates.

Deductions for Rental Expenses

The second major tax issue associated with renting the family home is to determine what types of deductions to claim for expenses relating to the property. This issue turns on whether the property is being held for the production of income. Section 183 of the Code generally limits the amount of deductions that can be claimed for maintenance, insurance, and depreciation to the amount of rental income if the property is not being held for the production of income.[105] On the other hand, if the property is held for income production, section 212 allows the taxpayer to deduct all ordinary and necessary expenses paid or incurred in the tax year in connection with the property.[106]

A recent case, *Bolaris v. Commissioner*,[107] presented the issue of whether a taxpayer could claim section 212 deductions for expenses incurred in leasing a home and still be able to rollover the gain on the subsequent sale of the property. The IRS and the Tax Court took the position that a home that retained its character as a principal residence under section 1034 could not be considered as being held for the production of income for purposes of section 212 deductions.[108] The Ninth Circuit disagreed with this position and held that sections 1034 and 212 were not necessarily mutually exclusive; a leased home can qualify for both nonrecognition of gain and as being held for the production of income.[109] The court cautioned, however, that not all homes being rented prior to sale will automatically qualify as being held for the production of income.[110] Rather, to qualify, the rental property must be held for the "predominate purpose and intention of making a profit," and in making this determination, all of the facts and circumstances must be considered.[111]

The *Bolaris* decision provides an incentive for some taxpayers to lease their homes before selling them.[112] The decision is clearly beneficial from a tax standpoint because it enables taxpayers to enjoy the dual benefit of claiming more generous deductions under section 212 and deferring any gain on the eventual sale pursuant to section 1034.

Although the taxpayer in *Bolaris* rented his home because of a poor real estate market, the dual tax benefit should also be available to taxpayers who lease their homes temporarily with the intention of returning. In either case, however, taxpayers must be able to show that they possess the requisite profit motive to claim section 212 deductions.[113] A taxpayer who leases his or her residence at or above fair market rental value will probably be considered as being engaged in the activity for income production.[114] In this regard, it should be noted that it is not absolutely essential that the rental activity produce a profit at all times, as long as the taxpayer can show that he or she entered into the activity for the purpose of making a profit.[115]

The *Bolaris* dual tax benefit will not be available to taxpayers who fail to sell the rental home within the statutory time limits of section 1034.[116] Moreover, taxpayers who lease their homes within the section 1034 time limits must still be able to show that the home has retained its character as a personal residence. Probably the best way to establish this conclusion is to limit rental deductions under section 183.[117] Although this will not take advantage of both of the tax benefits offered in *Bolaris*, it is the safest

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[104] Houlette v. Commissioner, 48 T.C. 350 (1957).

[105] I.R.C. § 183(b) (1982). An almost identical provision limits deductions that may be taken for vacation home expenses. I.R.C. § 280A (1982). These sections permit deductions for interest expenses that exceed rental income to offset ordinary income. But the deductions for expenses such as insurance, maintenance and depreciation can only be offset against rental income. *See* Treas. Reg. § 1.183–1(b) (1956).

[106] I.R.C. §§ 167 and 212 (1982); *see also* I.R.C. § 162 allowing deductions for all necessary and ordinary expenses paid or incurred in the tax year to carry on any trade or business. Taxpayers who have leased their homes should consult IRS Publication 527, Rental Property (Rev. 1986) prior to completing their tax returns.

[107] 776 F.2d 1428 (9th Cir. 1985), *rev'g* 81 T.C. 840 (1983). In *Bolaris*, the taxpayer leased his home on a month to month basis after no offers to buy were made during a 90 day listing. The taxpayer terminated the lease after several months and six weeks later accepted the first offer to buy the residence.

[108] Bolaris v. Commissioner, 81 T.C. 840, 844 (1983), *rev'd*, 776 F.2d (9th Cir. 1985). This position was based on an interpretation of the legislative history of section 1034.

[109] 776 F.2d at 1434.

[110] *Id.* at 1433.

[111] *Id.* at 1432 (quoting Allen v. Commissioner, 72 T.C. 28, 33 (1979)). This is determined by reference to five factors: the length of time the home was occupied by the individual as his residence before placing it on the market for sale; whether the individual permanently abandoned all further personal use of the residence; the character of the property (recreational or otherwise); offers to rent; and offers to sell. The court adopted these factors from Grant v. Commissioner, 84 T.C. 809 (1985). *See also* Newcombe v. Commissioner, 54 T.C. 1298 (1970). Treas. Reg. § 1.183.2(a) (1956) also lists nine different factors to determine whether property is held for the production of income.

[112] Two articles discussing the tax benefits of the *Bolaris* decision are Boucher & Raabe, Bolaris *Decision Makes Temporary Rentals More Attractive to Homeowners*, 65 Taxes, 28 (1987); and Lipton, *New Decision Encourages Rental of A Principal Residence Prior To Its Sale*, 64 J. Tax'n 66 (1986).

[113] *See, e.g.*, Newcombe v. Commissioner, 54 T.C.M. (CCH) 1298 (1970); Lewis v. Commissioner, 73–1 U.S.T.C. 9254 (S.D. Ohio).

[114] Normally, leasing a home at fair market value indicates profit motive and results in a conversion to income producing property. McDan v. Commissioner, 51 T.C.M. (CCH) 241 (1986); Jasinowski v. Commissioner, 68 T.C. 312 (1976); Rev. Rul. 75–14, 1975–1 C.B. 90.

[115] Treas. Reg. § 1.212–1(a) and (g) (1956). In *Bolaris*, the court overlooked the fact that the rent the taxpayer was receiving did not cover his mortgage expenses. *See also* Sherlock v. Commissioner, 31 T.C.M. (CCH) 383 (1972).

[116] The taxpayer in *Bolaris* purchased a new residence and sold the rental property within the statutory time frame. 776 F.2d at 1429. The IRS will undoubtedly take the position that a home that is rented for profit for a period longer than the section 1034 limits will not be entitled to deferral of gain.

[117] I.R.C. § 183 (1982).

strategy for taxpayers expecting to realize a significant gain on a home that will be sold within the statutory period.[118]

Taxpayers who will not be able to sell their former homes within the statutory replacement period, or who expect to incur a loss of the sale of the property, should consider taking section 212 deductions and establishing the character of the home as being held for the production of income prior to the sale of the home. This will enable the taxpayer to deduct most of the expenses associated with the rental operation including mortgage interest, repairs, insurance, property taxes, and depreciation.[119] The conversion will also enable the taxpayer to recognize any loss sustained on the sale of the residence pursuant to section 165.[120]

Taxpayers who purchase rental properties or who convert their homes to income-producing properties after 1986 will not be entitled to the generous depreciation schedule under the Accelerated Cost Recovery System (ACRS) which has been in effect since 1981.[121] Under the 1986 Tax Reform Act, the depreciation allowance for property purchased or converted after 1986 is based on a 27.5 year recovery, straight-line depreciation schedule.[122] Taxpayers placing property "into income producing service" prior to 1987 will generally be allowed to keep the depreciation schedules they have been using.[123]

Passive Loss Limitations

The ability of rental property owners to use rental property to offset other income sources has been severely limited by the 1986 Tax Reform Act. In an effort to wipe out tax shelters, Congress has limited the amount of deductions that can be taken for "passive activities," such as real estate rentals.[124]

The 1986 change limits deductions or credits from passive activities to the extent they exceed the income from all of the taxpayer's passive trade or business activities.[125] Rental activities of any kind are always considered passive activities for purposes of the loss limitations.[126] A taxpayer may deduct up to $25,000 a year in rental activity losses against nonpassive income, however, if the taxpayer owns at least a ten percent interest in the property and "actively participates" in the rental activity.[127] The phrase "actively participates" is not defined in the new Act, but taxpayers should be able to meet the standard by making significant management decisions with respect to the rental activity such as approving lease terms, selecting tenants, and making repair and maintenance decisions.[128] A taxpayer who hires a rental agent and is not significantly involved in management decisions will probably not satisfy the requirement.[129]

If the "actively participates" standard is met, losses up to $25,000 may be deducted against ordinary income, provided there is insufficient other passive income to absorb the loss. The amount exceeding $25,000 is suspended until income is generated by the activity.[130] The deduction is phased out between the adjusted gross income level of $100,000 to $150,000, determined without regard to passive losses.[131] When the taxpayer's entire interest in the rental property is sold in a taxable transaction, the suspended and current losses incurred in the activity will be allowed in the year of sale.[132]

The passive loss limitation rules will have the greatest impact on military taxpayers who have invested in rental activities to generate losses to offset other income. Despite the new limitations, rental property owners can still deduct up to $25,000 by remaining actively involved in managing the property.

Another important development in the 1986 legislation that could affect rental property owners is the extension of the "at risk" rules to real property.[133] Under the "at risk" loss limitation rule, a taxpayer's deductible loss from a real estate activity will be limited to the amount he or she has invested in the activity.[134] This loss limitation rule did not

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[118] For a discussion of tax strategies in light of *Bolaris*, see Auster, *Selected Tax Strategies Involving the Principal Residence*, 64 Taxes 239 (1986); Boucher & Raabe, *supra* note 112; Langstrat, *Tax Aspects of Renting a Residence Pending Sale*, 71 A.B.A. J., Mar. 1985, at 84.

[119] I.R.C. § 212 (1982).

[120] I.R.C. § 165(a) (1982). Treas. Reg. 1.165–9(b) (1956) allows a deduction for losses sustained on the sale of a personal residence that has been converted to income producing property prior to sale. The basis for computing the loss (and depreciation) for such a property is the lesser of the taxpayer's adjusted basis or the fair market value of the property at the time of conversion. Treas. Regs. §§ 1.167–9(g)(1) and 1.165–9(b)(2) (1956).

[121] I.R.C. § 168(c), *as amended by* 1986 Act § 201. The ACRS in effect since 1981 allowed taxpayers owning rental property to use a rapid 19 year, 175% declining balance schedule. The 1986 Act substantially modifies the ACRS under a Modified ACRS (MACRS) system.

[122] I.R.C. § 168(b)(3)(A), *added by* 1986 Act § 201. A taxpayer may elect modified ACRS treatment, however, if the property was "placed in service" after July 31, 1986 and before 1987.

[123] I.R.C. § 168(b) (West Supp. 1987).

[124] I.R.C. § 469, *as added by* 1986 Act § 501(a).

[125] I.R.C. § 469(h)(1) (West Supp. 1987). The passive activity loss rules are phased in over a four-year period if the taxpayer was engaged in the activity prior to enactment of the 1986 Tax Reform Act (October 22, 1986). The allowance percentages are 65% in 1987, 40% in 1988, 20% in 1989, and 10% in 1990.

[126] The 1986 Tax Reform Act defines passive activities as those that involve business and investment activities in which the taxpayer does not "materially participate," and all residential and other rental activities regardless of whether the taxpayer materially participates. I.R.C. § 469(c) (West Supp. 1987).

[127] I.R.C. §§ 469(c)(2) and 469(j)(8) (West Supp. 1987).

[128] The Research Institute of America, *The RIA Complete Analysis of the '86 Tax Reform Act*, ¶ 459, at 152 (1986).

[129] *Id.*

[130] I.R.C. § 469(i)(1) (West Supp. 1987).

[131] Thus, the $25,000 deduction is reduced by 50% of the taxpayer's adjusted gross income over $100,000. The offset will not be available for taxpayers with adjusted gross incomes over $150,000. I.R.C. § 469(i)(3)(A) (West Supp. 1987).

[132] *Id.; see also* Conf. Rep. *supra* note 9.

[133] I.R.C. § 465(c)(3), *as amended by* 1986 Act § 503(a).

[134] *Id.*

apply to real estate losses prior to the Tax Reform Act of 1986.

Conclusion

Although several significant changes in the area of real estate taxation have been made, for the most part the 1986 Tax Reform Act retains the features of the Code that make home ownership attractive from an income-tax perspective. One of the most beneficial decisions made by Congress was to continue to allow the home mortgage loan interest deduction even for military personnel receiving tax-free allowances.[135] Nevertheless, by capping the qualifying mortgage debt to the taxpayer's basis and the amount of educational and medical expenses, Congress has limited the ability to use the home as a source for obtaining interest deductible equity loans.[136] Furthermore, the generous standard deduction and tax rate reductions implemented in the new tax law will comparatively reduce the size of the tax advantage homeownership formerly offered over renting.[137]

One of the major tax breaks afforded to homeowners, the deferral of tax on recognized gain under section 1034, was not significantly changed by the Tax Reform Act.[138] The repeal of the capital gains deduction after 1986 makes rollover of gain tax treatment under this section even more significant to homeowners.[139] Congress has helped active duty homeowners take advantage of section 1034 by extending the two year statutory time for replacing a former residence, up to a maximum of four years, and in the case of soldiers serving overseas, up to eight years.[140]

Leasing a home prior to sale has several significant tax consequences. Whether a leased home will retain its character as a principal residence for section 1034 treatment will depend on all of the facts and circumstances of the transaction.[141] It is possible, according to a recent court decision, for a rental home to qualify both as a principal residence for section 1034 purposes, and as being held for production of income for deduction of all rental expenses.[142] After 1986, taxpayers must be actively involved in managing rental activities to entitle them to deduct up to $125,000 in losses sustained by the activity from nonpassive income sources.[143]

Appendix A

The following example shows the calculations for determining realized gain and recognized gain when a taxpayer sells a home and purchases another one.

COL Owner sold his home for $90,000. The adjusted basis of the home was $63,000. Selling expenses were $6,000. The cost of fixing up the old residence to help sell it was $4,000. Three months after selling his home, COL Owner purchased a new residence for $78,000. He computes his realized and recognized gains as follows:

1.	Selling price of former home	$90,000
2.	Minus selling expenses	6,000
3.	Amount realized on sale	84,000
4.	Minus adjusted basis of former home	63,000
5.	REALIZED GAIN	21,000
6.	Amount realized on sale (line 3)	84,000
7.	Minus fix-up expenses	4,000
8.	Adjusted sales price	80,000
9.	Adjusted sales price (line 8)	80,000
10.	Minus cost of new home	78,000
11.	RECOGNIZED GAIN	2,000

COL Owner must pay tax at the ordinary rates on the $2,000 recognized gain. The basis on his new residence is $59,000, derived by subtracting the $19,000 nontaxable gain from the sale of the old home ($21,000 realized gain less $2,000 recognized gain), from the $78,000 purchase price of the new home.

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[135] I.R.C. § 265, *as amended by* 1986 Act § 144.

[136] *See* I.R.C. § 1, *as amended by* 1986 Act § 101(a); I.R.C. § 63, *as amended by* 1986 Act § 102(a).

[137] I.R.C. § 163(h)(3)(B)(ii) (West Supp. 1987).

[138] I.R.C. § 1034 (1982).

[139] I.R.C. § 1202, *repealed by* 1986 Act § 301.

[140] I.R.C. § 1034(h)(2), *as amended by* 1986 Act § 1878(g). Extra time is also available to soldiers returning from overseas duty who are required to live on post because of inadequate off-post housing.

[141] Treas. Reg. § 1.1034–1(c)(3)(i) (1956).

[142] Bolaris v. Commissioner, 776 F.2d at 1348. *See also supra* note 107 and accompanying text.

[143] I.R.C. § 469 (West Supp. 1987).

USALSA Report

United States Army Legal Services Agency

Trial Counsel Forum

Trial Counsel Assistance Program

The Rape Shield: The Veil Extends to Sentencing

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Introduction

The Court of Military Appeals recently addressed the applicability of Military Rule of Evidence 412 to the sentencing phase of trial. Primarily a rule of relevance, the "rape shield" rule restricts the use of certain sexual behavior evidence of a victim of a nonconsensual sex offense. The rule "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses."[1]

In *United States v. Fox*,[2] the court held that the exclusionary provisions of Rule 412 should not be relaxed during the hearing on sentencing. In applying Rule 412 to the evidence proffered by the defense in *Fox*, the court reached an opinion that will likely broaden litigation on sentencing with respect to past sexual behavior evidence.

This article updates trial counsel on the application of Mil. R. Evid. 412 to sentencing evidence, offers a prosecutorial approach for use when arguing against introduction of past sexual behavior evidence, and warns of potential weakpoints of the "shield" as identified in the *Fox* opinion.

Background

In past courts-martial practice, it was routine to place the chastity of the victim of a sex offense in issue—in effect, placing the victim on trial.[3] Mil. R. Evid. 412 stopped encouraging this practice,[4] and ushered in restricted use guidelines. These evidentiary limitations were enacted in response to the realization that litigation of the past sexual history of the victim tends to cloud the pertinent issues at trial, confuse the fact-finder, and demean the victim.[5]

The drafters of Rule 412 intended that this rule of evidence exclusively "control the use of character and conduct evidence of the victim in sexual offense prosecutions."[6] Although broader than its federal rule counterpart,[7] Mil. R. Evid. 412 is not an absolute bar to all evidence of past sexual conduct.[8] Mil. R. Evid. 412 applies only to cases in which nonconsensual sexual offenses[9] are charged, and deals generally with evidence of the victim's past sexual behavior. Mil. R. Evid. 412(a) governs evidence of sexual behavior of the victim based on opinion or reputation.[10] That paragraph provides that reputation and opinion evidence is never admissible. Some commentators and dicta,

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[1] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 412 analysis, app. 22, at A22–34 [hereinafter Mil. R. Evid. 412 analysis].

[2] 24 M.J. 110 (C.M.A. 1987).

[3] *See* S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 402 (2d ed. 1986) [hereinafter Saltzburg].

[4] Prior to the enactment of Mil. R. Evid. 412, the traditional approach permitted the defense to introduce evidence of the unchastity of the victim. "Trying the victim" was permitted, if not encouraged, by past practice. It allowed defense counsel to present opinion and reputation evidence dealing with every facet of the victim's past sexual behavior, from associations to specific instances of illicit sexual intercourse. The only codified limitation here was the [1969] *Manual's* prohibition against remote evidence.
Saltzburg, *supra* note 3, at 402 (footnote omitted); *see also* Rose & Chapman, *The Military's Rape Shield Rule: An Emerging Roadmap*, The Army Lawyer, Feb. 1984, at 30 [hereinafter Rose].

[5] Mil. R. Evid. 412 analysis, at A22–34; Rose, *supra* note 4, at 30–31.

[6] Saltzburg, *supra* note 3, at 402.

[7] Federal Rule of Evidence 412 only applies to cases in which rape or assault with intent to commit rape is charged, whereas Mil. R. Evid. 412 covers "nonconsensual sexual offenses," which are defined as sex offenses "in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with the intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." Mil. R. Evid. 412(e).

[8] *See* United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983); United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983); United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983).

[9] *See supra* note 7.

[10] Mil. R. Evid. 412(a) provides: "Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible."

however, suggest that this type of evidence could conceivably rise to constitutional levels requiring admissibility.[11]

Mil. R. Evid. 412(b) deals with all evidence, other than opinion or reputation, of the victim's past sexual behavior.[12] Under this paragraph, such evidence is admissible *unless* it fits within one of two categories: the evidence is constitutionally required and the provisions of Mil. R. Evid. 412(c)(1) and (c)(2) are followed;[13] or the evidence details the victim's past sexual behavior with persons other than the accused and is offered to prove the source of semen or injury; or with the accused in the past and is offered to show consent, and Mil. R. Evid. 412(c) is followed. Therefore, the only time evidence of a victim's past sexual behavior is admissible is when it is constitutionally mandated, or when evidence of the victim's past sexual *acts* is pertinent to the issue of source of semen or injury, or consent of the victim to the charged sexual activity.

The admissibility of constitutionally required evidence under Mil. R. Evid. 412 is tested by a four-prong analysis:[14] is the evidence relevant?;[15] is it material?;[16] is it favorable to the defense?; and does it pass scrutiny under the Mil. R. Evid. 412(c)(3) balancing test, *i.e.*, does the probative value of the evidence outweigh the danger of unfair prejudice?

Application of this test by the Court of Military Appeals has produced a variety of results regarding evidentiary matters during the findings portion of trial,[17] yet the court did not fully focus on the applicability of the "rape shield" to the sentencing phase of trial until *Fox*.[18]

The Facts

Specialist Four Charles Fox was charged with committing an indecent assault upon his sixteen-year-old babysitter. He admitted during the providency inquiry that he committed the assault and that the victim did not consent. He alleged that the victim enticed him into committing the offense when she came out of the bathroom, after taking a shower, wearing only a towel wrapped around her which extended to just below the waist. According to the accused, the babysitter then dropped something and bent over to pick it up. The accused claimed that she exposed herself, then giggled about it and went to the bedroom.

Inspired by her display, the accused assumed she was making a pass at him and went to the bedroom. When he entered the room, the young girl was wearing only panties. He asked her to have sex with him. When she declined, he approached her and touched her breast. She backed away and responded negatively to the accused's repeated requests to "make love" to him. At this point, he picked her up, laid her on the bed, and began to fondle her.

The accused conceded that the victim did not consent, and that he was not really sure what made him do it. He testified in a sworn statement on sentencing that he knew it was a mistake "because [he] almost committed adultery, and [he] didn't want to do that."[19] The accused's rendition of the events in the apartment that day differed significantly

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[11] The drafters of the rule provided that:

> Evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a). It is unclear whether reputation or opinion evidence in this area will rise to a level of constitutional magnitude, and great care should be taken with respect to such evidence.

Mil. R. Evid. 412 analysis, at A22–34; *see also Holliman*, 16 M.J. at 166 ("[w]e can conceive of cases in which even evidence of an alleged victim's reputation might be quite relevant in a prosecution for a sexual offense . . . despite the purported absolute bar contained in Mil. R. Evid. 412(a)").

[12] Mil. R. Evid. 412(b) provides, in part:

> Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—
>
> (1) admitted in accordance with subdivisions (c)(1) and (c)(2) and in constitutionally required to be admitted; or
>
> (2) admitted in accordance with subdivision (c) and is evidence of—
>
> (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
>
> (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

[13] Mil. R. Evid. 412(c) provides:

> (1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.
>
> (2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).
>
> (3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

[14] *See Dorsey*, 16 M.J. at 5; *Colon-Angueira*, 16 M.J. at 24; *Hollimon*, 16 M.J. at 165.

[15] Military Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[16] "[T]o be relevant evidence must involve a fact 'which is of consequence to the determination of the action.' " Mil. R. Evid. 401 analysis, at A22–31; *see also Dorsey*, 16 M.J. at 6 ("In other words, was the fact intended to be proved by the evidence 'of consequence to the determination of' appellant's guilt?").

[17] *See supra* note 8; *see also* United States v. Hicks, 24 M.J. 3 (C.M.A. 1987); United States v. Saipaia, 24 M.J. 172 (C.M.A. 1987).

[18] The Court of Military Appeals did briefly address the issue of the use of Mil. R. Evid. 412 on sentencing in United States v. Elvine, 16 M.J. 14, 18 (C.M.A. 1983). There the defense sought to call the prosecutrix to the stand on sentencing to show that she had resumed a normal sex life after the rape, and, therefore, she was *not* emotionally scarred by the rape. The court, finding that the trial counsel avoided the issue of trauma to the victim and that the defense failed to demonstrate that the evidence was relevant, material, and favorable, upheld the exclusion of this evidence.

[19] Record at 102, *Fox*, 24 M.J. 110 (C.M.A. 1987).

from that of the victim.[20] The accused stated: "Well, knowing [the victim]—the type of person [she] is—the things I've heard about [her], everything, I assumed right then that apparently she was making a pass at me."[21] It is this allegation that became the issue.

At a pretrial hearing pursuant to Article 39(a), Uniform Code of Military Justice,[22] the defense counsel moved that reputation evidence of the victim's reputation for alleged sexual promiscuity and evidence of specific acts of sexual conduct occurring before and after the charged assault be admitted. The accused wanted to prove, using extrinsic evidence, the "type of person" the victim was. Specifically, he wanted to call three witnesses who would testify that the victim was flirtatious, promiscuous, and generally a tease. This included the testimony of a soldier who had an encounter with the girl in a men's latrine, and the testimony of the victim's stepsister who knew of the victim's promiscuous behavior. The witnesses would further testify that these episodes of promiscuity were known by the accused.

The accused theorized that these previous sexual comeons by the victim supported his contention that he was enticed into committing the offense. The defense was careful in its presentation of this allegation, acknowledging that it was clear that the victim had tried to avoid his advances before the assault and that she did not in fact consent to his actions even though the accused may have originally believed he was being invited to make his advances.

The defense presented two theories for admitting the victim's prior sexual activity. The first proposed that the evidence should be admitted for extenuating purposes in explaining the circumstances of the assault. Specifically, it explained that the accused did not act wantonly. The evidence showed that he did not assault someone whom he viewed as an innocent young victim. Instead he was acting, at least at first, under a mistaken belief that she wanted him.

The second theory was based on the assertion that this victim, being unchaste, was apt to be less traumatized than someone with a chaste background. The defense counsel posited that "it's important for [the members] to also determine what effect this offense may have had on the victim, because clearly someone with a chaste background would suffer presumably greater consequences from this kind of act than someone of the character of the victim in this case."[23] Additionally, the defense counsel argued that Mil. R. Evid. 412 did not apply to the sentencing phase of trial because evidentiary rules may be relaxed.

The military judge denied the defense motion. He ruled that the accused could testify as he wanted to on sentencing.[24] The judge, however, denied for lack of relevance admission of any reputation or opinion evidence of the victim's past sexual conduct, and ruled that Mil. R. Evid. 412(a) applied to sentencing.[25]

Ultimately, the accused was sentenced to a bad conduct discharge and reduction to the lowest enlisted grade.

The Opinion of the Court

At the outset, Judge Cox, writing for the court, stated that Mil. R. Evid. 412 is not limited to the findings portion of trial because such a restriction would defeat the rule's purpose, "to protect victims of nonconsensual sexual offenses against needless embarrassment and unwanted invasion of privacy."[26] At the same time, the court reiterated that the rule is not an absolute bar to evidence of victims' past sexual conduct. Recognizing Rule 412 as primarily a rule of relevance, the court noted that "[a]dmissibility of such evidence is dependent on its relevance to the issue at hand, rather than upon the character of the pleas or upon whether it is offered on findings or sentence."[27] The court adopted the same four-prong test for admissibility that had been developed in past cases:

> When the defense seeks to present evidence which is subject to the exclusionary provisions of Mil. R. Evid. 412, it must clearly demonstrate that the proffered evidence is relevant, material, and favorable to its case. . . . Furthermore, the "probative value of" the evidence must outweigh "the dangers of unfair prejudice."[28]

In upholding the military judge's decision to exclude the proffered evidence, the court related that the defense is required to demonstrate that the evidence is "relevant, material, and favorable to the defense *on the issue of sentence appropriateness*."[29]

The court agreed with the accused's argument that his state of mind at the time of the assault was relevant for determining an appropriate sentence in light of the purpose of extenuation evidence on sentencing. The court reasoned that the fact that a person believed, at the time he initiated a sexual advance, that his overtures were met by a willing

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[20] The victim was called by the trial counsel as a rebuttal witness during sentencing. She related that she was "positive" that the accused could not have viewed her genitalia; and she denied ever having flirted with the accused or making a pass at him. She described herself as "scared" when he entered the bedroom and approached her. Record at 113, *Fox*.

[21] Record at 101, *Fox*.

[22] Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839(a) (1982).

[23] Record at 17, *Fox*.

[24] The military judge stated, in part:

> As I said before, I'm talking about evidence other than reputation or opinion evidence of the past sexual behavior of the victim. If the accused takes the stand and he testifies that he knows of past acts of the victim, et cetera, of course, he can testify to that. Anything he has knowledge of that would explain . . . his actions in doing what he did, that's fine. That's permissible. But for another witness to come in here and testify as to her reputation or give their opinion about those matters, no, I will not permit that.

Record at 29, *Fox*.

[25] Record at 28–29, *Fox*.

[26] 24 M.J. at 112.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 111 (emphasis added).

partner may serve to minimize his culpability in some eyes, even though he continued his course of sexual misconduct after learning of his partner's unwillingness to cooperate. An offender harboring such beliefs could be seen as being "less culpable than that of one who, at the outset, knows his advances are unwelcome." [30] Judge Cox pointed out that the accused testified at trial about his state of mind at the time of his offense, and his belief about the victim and her reputation. This testimony was not challenged by the trial counsel.

In holding that the defense's evidence of the victim's unchaste character was not constitutionally required, the court rejected the two defense theories of relevance, the first alleging that the victim's promiscuous conduct and bad reputation was relevant to show the accused's state of mind immediately before the sexual assault, [31] and the second alleging that this evidence would demonstrate that the victim was not traumatized by the assault. [32] The court focused its attention upon the issue on sentencing: "What is a 'legal, appropriate and adequate' sentence?" [33]

As for the first theory, the court found that the fact that the victim had a reputation for sexual promiscuity would not have enlightened the members as to the accused's state of mind, even though the state of mind was relevant. The defense did not show how evidence of past sexual acts was relevant to the determination of an appropriate sentence. "Whether the victim was in fact a promiscuous 16 year-old girl or whether she had such a reputation was not relevant or material to an appropriate sentence. This evidence would only have served to embarrass the victim and distract the court members." [34]

The defense unsuccessfully argued a second theory of relevance by suggesting that the proffered evidence would demonstrate that the victim had not been traumatized by the accused's assault. Apparently the defense failed to pass the court's scrutiny on two points with respect to the "lack-of-trauma theory." First, the court noted the lack of any basis for the defense's "bald assertion." [35] There was no evidence that showed that an unchaste woman would suffer less trauma than a chaste woman. Additionally, the "trial counsel presented no evidence of trauma. Indeed, he conceded in argument on sentence that the victim did not 'suffer any long-term or long-standing effects from this.' " [36] The court held that the military judge did not err by excluding the proffered evidence.

Chief Judge Everett expressed his view in his concurring opinion: "As I understand the majority opinion, evidence regarding the victim's previous sex life would have been admissible on sentencing relevant to the level of trauma suffered by the victim from appellant's assault—if defense counsel had properly made this link." [37]

The Analysis

The Court of Military Appeals decision at the outset purports to provide a "bright line" rule by finding that Mil. R. Evid. 412 is applicable during sentencing. The court's decision recognized that Rule 412's bar to evidence potentially can be constitutionally required to yield during the sentencing phase of trial. The admissibility of such evidence is dependent on its relevancy to the contested issue at that stage: What is an appropriate sentence? Just as on findings, the "shield" provided to the victim at this stage is not absolute.

The rule itself recognizes that there may be times when prior sex acts are admissible. For instance, evidence showing that the accused and victim had *prior* consensual sex is relevant on the issue of consent. The purpose of the rule, however—the protection of the chaste and the unchaste alike—has consistently been heralded by the court. Indeed, the *Fox* decision reiterates this position that "[c]ertainly, an unchaste woman has just as much right to be protected from nonconsensual sexual assaults or abuse as a chaste woman." [38]

Notwithstanding this pronouncement and the judicial policy that the chaste and the unchaste should be treated equally on findings, the latter part of the *Fox* decision reveals that they may be viewed differently on sentencing. Although *Fox* begins nobly in stating that the victim of a sexual assault will continue to be shielded from an unwarranted and embarrassing recount of her prior conduct, it concludes with a disturbing summation. The majority in *Fox* intimated that the defense may have been allowed to introduce evidence of the victim's unchasteness if it "somehow would show that she had not been traumatized by the assault." [39] But for the defense's failure to offer a basis for its "bald assertion," it appears that the court would have permitted the evidence. Chief Judge Everett asserted this proposition even more directly in his concurring opinion by stating that the defense could have demonstrated the level of trauma suffered by the victim—apparently regardless of the trial counsel's silence on this issue—if it had made the "link." What began as a bright line has ended in a yawning cleft of gray.

Under the *Fox* rationale, the victim's prior sexual conduct and unchaste behavior will be admissible if the defense can show that the victim has been less traumatized because of her prior sexual conduct. This raises the question: What is the trauma standard? The victim must be less traumatized than whom? Is a virgin the standard? Does the trauma suffered by the victim now compare to that suffered by a hypothetical chaste victim? Arguably, trauma may be more pronounced in a nun than a prostitute as a result of a

[30] *Id.*

[31] *Id.* at 112.

[32] *Id.* at 113.

[33] *Id.* at 111 (citing United States v. Combs, 20 M.J. 441, 442 (C.M.A. 1985); United States v. Courts, 9 M.J. 285, 292 n.14 (C.M.A. 1980)).

[34] *Id.* at 112.

[35] *Id.* at 113.

[36] *Id.*

[37] *Id.* (Everett, C.J., concurring).

[38] *Id.* at 112.

[39] *Id.* at 113.

sexual assault. Note that this only "may" be the case because adding force to any activity totally changes its character. It seems ironic that an accused will be allowed to benefit because of the unchaste character of a victim that he has forcibly assaulted. The broad language in *Fox* indicates that an accused may benefit from the victim's unchaste character even though he may not have known of that character at the time of the assault. This becomes a sort of "luck of the draw" situation for the accused, allowing him to benefit from a set of circumstances that were unknown to him and in no way reflects on *his* culpability in committing the offense.

The victim in *Fox* may very well have been unchaste prior to the assault and this fact may have been known to the accused. He was allowed to testify to that belief. At the time when he committed the assault, however, he knew he was doing so against the victim's will. In that regard, he shares the same state of mind as the individual who assaults a virgin. Both know the victim does not consent. Nevertheless, both continue their advances to satisfy their own desires with no regard for the victim. At that point in time it makes little difference to either of the perpetrators whether the victims are sinners or saints. They have only their immediate lust in mind and it is for this lack of self control that they are punished.

The lack of clear limits in the *Fox* decision will inevitably lead to abuse of the victim. The defense will be allowed to turn the focus of the sentencing proceedings away from the accused and on the victim and her past, much the same way as was done on the merits of a sexual assault case prior to the adoption of Rule 412.

The Prosecutorial Approach

Trial counsel must be prepared to resist defense attempts to gain admission of Mil. R. Evid. 412 evidence on sentencing.[40] Keep in mind that the only time any evidence of the victim's past sexual behavior is admissible is when it is constitutionally required. To rise to this level, the evidence must meet the four-prong test involving relevance, materiality, favorability, and probative value. Trial counsel must hold the defense accountable to each of these prongs, and must continue to argue that reputation and opinion evidence is barred from admission despite the drafter's suggestion that the expressed prohibition in Mil. R. Evid. 412(a) may have to give way to constitutional requirements.

The case in which reputation and opinion evidence is constitutionally required on sentencing is difficult to imagine. Nothing will confuse the sentencing authority more in reaching an appropriate sentence than the consideration of this extraneous evidence. The "danger of unfair prejudice" will always be overwhelming.

It is clear from *Fox* that the defense must establish the "link" of relevancy for evidence of prior sexual conduct of the victim. On sentencing, the only opportunity the defense will have to meet this burden is if the trial counsel allows it. If the door is opened to trauma evidence by the trial counsel, defense counsel will be permitted to respond. Any evidence of the trauma suffered by the victim could open that door. Placing the victim in a false light could have the same effect. If the victim's sexual background is misrepresented by the prosecution—*e.g.*, if the victim was held out as a virgin when in fact she was not—the defense will have a strong argument to support introduction of evidence of past sexual intercourse in order to set the record straight. Trial counsel are responsible for knowing the background of the victim when litigating a sexual offense. If trial counsel are uncomfortable with the sexual history of the victim, or know of the victim's unchaste character, proceed with care! If unsure, avoid the issue of the victim's chastity or emotional trauma on sentencing.[41] If the door is not opened, the defense should be foreclosed from introducing sexual behavior evidence. The defense should not be permitted to independently introduce sexual conduct evidence of the "level" of trauma. The level of trauma suffered by any one victim is too subjective and too immeasurable for any sexual behavior evidence to address. Without a prosecution-initiated "benchmark" to set a measure for defense rebuttal, Mil. R. Evid. 412 should apply in sentencing proceedings.

Conclusion

Fox has "suggested" the opportunity for the defense to introduce evidence of the victim's unchaste character during sentencing. Trial counsel should avoid presenting the defense this opportunity by testing the relevance of the defense evidence prior to any introduction of character evidence by the government. Furthermore, trial counsel should be prepared to rebut the contention that an unchaste victim is less traumatized than a chaste victim.

A preferred procedure on sentencing would assure that the victim's character would not unnecessarily be laid open in court and at the same time protect accused from unfair prejudice. This could be accomplished by allowing an accused to introduce evidence of the victim's past sexual conduct or unchaste character *only* to rebut a false character put forth by the government or the victim. Such limitations would serve to protect both the victim and the accused. Considering the lack of restrictions placed on the defense in proving the "impact on the victim," it is only a matter of time before the defense supports its "bald assertion" that an unchaste victim is less traumatized and presents evidence concerning the victim's past sexual conduct.

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[40] *See* Rose, *supra* note 4, for a list of practical suggestions for counsel involved in rape shield litigation.

[41] *See* United States v. Elvine, 16 M.J. 14, 18–19 (C.M.A. 1983) where the defense was prohibited from introducing evidence that the victim resumed "normal" sex life after the rape. The government avoided "the issue of the rape victim's emotional trauma suffered as a result of the rape" and there was an "absence of evidence that she suffered serious and long standing emotional distress from the crime." *Id.* at 19.

Voir Dire and Challenges: Law and Practice

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Introduction

The definition of "voir dire" is "to speak the truth."[1] While the origin of voir dire examination of prospective jurors is rather obscure, there is no doubt that it developed as a natural concommitant of the right to an impartial jury.[2] This article has two purposes: to present an over-view of the development of the law of voir dire in the military courts; and to present some practical considerations in conducting voir dire and in preserving error for appellate review.[3]

Overview of the Law of Voir Dire and Challenges in Military Courts

Voir Dire

The right to voir dire prospective court members in the military system has three main purposes. The first purpose is to disclose disqualifications or actual bias.[4] The second is to aid counsel in wisely exercising the single peremptory challenge.[5] Both of these reasons have been recognized by military appellate courts. The third reason for voir dire is its use as a tactical device to indoctrinate the jury.[6]

The United States Court of Military Appeals has long taken an interest in the proper administration of voir dire and the surrounding legal questions. In *United States v. Parker,*[7] the court recognized that while voir dire could not go on indefinitely, when there is doubt as to the propriety of a question, it is better to allow it to be answered. The court went on to say that under the facts presented, the law officer did not abuse his discretion by not allowing the question. Judge Latimer did state, however, that "[w]hile materiality and relevancy must always be considered to keep the examination within bounds, they should be interpreted in a light favorable to the accused."[8]

Later decisions of the court indicated a strong shift in emphasis from the law officer's perogative in limiting voir dire to the defense's right to ask questions. In *United States v. Sutton,*[9] the trial defense counsel was attempting to inquire into a member's predisposition towards a finding of guilty when he asked, "Major, if a reasonable doubt were raised in your mind, would you vote for a finding of guilty?"[10] The law officer then interrupted the defense counsel to remind him that he would be instructing the members on the law, not the trial defense counsel.[11] On appeal, the Court of Military Appeals stated:

> While an accused is not entitled to favorable court members or any particular kind of juror, he is guaranteed the right to a fair-minded and impartial arbiter of the evidence. When one is found to be willing to convict, though he entertains a reasonable doubt of guilt, he fails to accord the proper scope to the presumption of innocence and may be imbued with the concept that the accused must be blameworthy, else he would not stand arraigned at the bar of justice. And to those who doubt the existence of such beliefs on the part of some court members, we point to our decision in *United States v. Carver* and *United States v. Deain.* Thus, it seems entirely proper for counsel to interrogate a member, as in this case, as to whether he entertains such beliefs and would convict despite a reasonable doubt of the accused's guilt.[12]

The differences in *Sutton* and *Parker* are subtle. *Sutton,* while ostensibly relying on *Parker,* emphasizes the point that had been merely referred to in *Parker, i.e.,* counsel should be allowed wide latitude. The court in *Sutton,* moreover, ignored the gist of *Parker,* which was that wide discretion should be accorded the decisions of the law officer regulating the conduct of voir dire.[13]

Two additional cases, *United States v. Freeman,*[14] and *United States v. Fort*[15] both dealing with rulings of law officers excluding questions, were upheld by the Court of

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[1] Black's Law Dictionary 1412 (5th ed. 1979).

[2] 4 W. Blackstone, Commentaries 352–55 (13th ed. 1800).

[3] The author makes no claim at being a trial tactics expert. It is hoped, however, that this article will be useful to practicing defense counsel in understanding the law of voir dire.

[4] United States v. Huntsman, 46 C.M.R. 410 (A.C.M.R. 1972).

[5] *Id.* at 411.

[6] Holdaway, *Voir Dire—A Neglected Tool of Advocacy,* 40 Mil. L. Rev. 1, 2 (1968).

[7] 6 C.M.A. 274, 19 C.M.R. 400 (1955).

[8] *Id.* at 279, 19 C.M.R. at 405.

[9] 15 C.M.A. 531, 36 C.M.R. 29 (1965).

[10] *Id.* at 534, 36 C.M.R. at 32.

[11] *Id.* at 535, 36 C.M.R. at 33.

[12] *Id.* at 536, 36 C.M.R. at 34.

[13] Holdaway, *supra* note 6, at 15.

[14] 15 C.M.A. 126, 35 C.M.R. 98 (1964).

[15] 16 C.M.A. 86, 36 C.M.R. 242 (1966).

Military Appeals. The defense question excluded in *Freeman* was:

> Now gentlemen, is there anybody on this court who does not think, in his own opinion, that a person can be so drunk that they cannot entertain a specific intent and a prescribed offense, such as, say, the intent to willfully disobey an order, or say, the intent to deprive somebody permanently of their property? [16]

Appellate defense counsel construed this question as whether anyone had a prejudice against intoxication as a defense. [17] The law officer, however, apparently construed this question as asking how the court would decide the case and based his ruling on that interpretation. In upholding the law officer's ruling, the Court of Military Appeals emphasized that the officer did not prohibit further questioning. This decision implies that the general line of questioning was proper. [18]

In *Fort,* the ruling of the law officer was attacked for improperly curtailing voir dire as to whether conviction would require a punitive discharge. The Court of Military Appeals, citing its decision in *United States v. Parker,* [19] found that the law officer had not abused his discretion. The court, however, stressed the fact that the law officer did not foreclose further inquiry, but merely directed that under the circumstances the inquiry would have to be on an individual basis. [20] The clear implication in *Fort* was that the content of the inquiry was proper and that a ruling of the law officer that closed an entire line of questioning would be error. [21]

Thus closing off an entire area of questioning during voir dire is normally reversible error. A blanket prohibition without an opportunity to rephrase or reevaluate possible areas of questioning as in *Freeman* [22] or to individually voir dire as in *Fort* [23] is inappropriate.

This principle is illustrated in a more recent case where the Army Court of Military Review held that voir dire was erroneously curtailed by the military judge. In *United States v. Huntsman,* [24] the defense counsel was not allowed to voir dire court members for possible prejudice in regard to the prior conviction of a vital defense witness for a felony-type offense. The court used *Parker* as a model to encourage judges to allow questions of even a questionable propriety.

In *United States v. Witherspoon,* [25] the Army court reiterated its commitment to a wide ranging voir dire examination. In *Witherspoon,* the military judge improperly limited voir dire when he stated that defense counsel's inquiry as to whether any of the members felt they were in any way racially prejudiced was too broad. The military judge did not preclude the defense counsel from developing the issue of racial prejudice, but defense counsel, for reasons known only to himself, declined to ask a more specific question.

Challenges for Cause

In *United States v. Smart,* [26] the Court of Military Appeals recognized the important principle that challenges for cause should be liberally granted. Smart pled guilty to robbery. [27] Following his guilty plea, the panel was sworn and questioned by counsel. On voir dire, two members stated that they had been victims of robbery. [28] Further questioning of panel member CPT [H] indicated that he had been the victim of two burglaries, rather than robbery. When asked whether these incidents would influence his decision on a sentence, CPT [H] answered that he was not certain, stating: "It's hard to say. I wouldn't say I positively could, because I'd have to hear circumstances of the case, and they might trigger something from the past, and again it may not." [29] Trial counsel's attempts to rehabilitate CPT [H] failed to elicit a clear statement from him that he could disregard his experiences. [30]

The military judge then asked CPT [H] if he could disregard outside influences and base his judgement solely on the facts presented in court and CPT [H] said, "Totally disregard, I'd say no." [31] After CPT [H] told the trial counsel that he still felt he could render a fair sentence, the military judge asked one last question:

> MJ: Captain [H] will you be able to consider the entire range of punishments available to the court all the way from no punishment at all, to the maximum punishment?
>
> (Captain [H]: No punishment no, sir, I will not consider that one." [32]

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[16] 15 C.M.A. at 128, 35 C.M.R. at 100.

[17] Holdaway, *supra* note 6, at 15.

[18] *Id.* at 16.

[19] 15 C.M.A. 126, 35 C.M.R. 98 (1964).

[20] 16 C.M.A. at 86, 36 C.M.R. at 242.

[21] *Id.*

[22] 15 C.M.A. 126, 35 C.M.R. 98 (1964).

[23] 16 C.M.A. 36, C.M.R. 242 (1966).

[24] 46 C.M.R. 410 (A.C.M.R. 1972).

[25] 12 M.J. 588 (A.C.M.R. 1981).

[26] 21 M.J. 15 (C.M.A. 1985).

[27] *Id.*

[28] *Id.* at 16.

[29] *Id.* at 16.

[30] *See* McShane, *Questioning and Challenging the "Brutally" Honest Court Member: Voir Dire in Light of* Smart & Heriot, the Army Lawyer, Jan. 1986, at 19.

[31] 21 M.J. at 17.

[32] *Id.*

The other member questioned individually on voir dire, a sergeant first class, explained that he grew up in Chicago and had been robbed "about six or seven times."[33] After further questioning, SFC [F] stated that he would consider the full range of punishments and could render a fair and just sentence in the case.

The defense challenged CPT [H] and SFC [F] for cause; the military judge denied both challenges. The Army Court of Military Review affirmed the findings of guilty and the sentence. The Court of Military Appeals affirmed the finding of guilty in light of Smart's guilty plea, but set aside the sentence because the military judge erred in denying the challenges for cause.[34]

Chief Judge Everett, in his opinion for the court, stated that members must have fair and open minds and the proceeding must be free from "substantial doubts as to legality, fairness and impartiality."[35] While recognizing that due deference should be given to the decisions of trial judges in this area, the court nevertheless urged judges to be liberal in granting challenges for cause.[36] The court stated its responsibility is "[e]specially great—perhaps greater than that of other appellate courts—because in courts-martial peremptory challenges are much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere."[37]

The court held that CPT [H's] statements indicating that he could not disregard his experiences and would not consider all punishment alternatives clearly supported the challenge for cause.[38] The court's decision regarding the challenge for cause of SFC[F] was somewhat tortured. Chief Judge Everett recognized that there are some circumstances when "bias may be implied,"[39] despite an assertion to the contrary, when a reasonable person in the same position would be prejudiced. Judge Cox, however, in a concurring opinion, noted that he did not intend to create any rule of law known as implied bias, "where a prospective court member had been the victim of crime similar to the one charged."[40]

The most important point emphasized by *Smart* is that court members must have a fair and open mind. Inconvenience in maintaining a quorum or any other factors not related to a member's ability to be impartial are not acceptable reasons to grant or deny challenges for cause. To ensure that members are impartial, military judges must be liberal in granting challenges for cause.

The importance of the rule that challenges for cause must be liberally granted was recently emphasized by the Army Court of Military Review in *United States v. Moyar.*[41] In *Moyar*, the Army court held that the military judge abused his discretion by failing to grant a challenge for cause against a court member whose sister had been the victim of indecent acts committed by their father. Questioning in this area was particularly relevant because Moyar had earlier pled guilty and was convicted of committing two indecent acts with his adopted daughter. During voir dire before sentencing, the challenged court member revealed that his sister had been molested by their father approximately twenty-six years before at a time when she was about the same age as the victim in the case at bar.[42] The military judge asked if the member had any doubt about his ability to remain fair and impartial. The prospective member answered "No, or I wouldn't have brought it [the subject of the challenge] up." After a somewhat lengthy discussion of this unusual response, the military judge finally denied the defense's challenge for cause.

The Army court's opinion discussed the unique nature of the military justice system and the fact that military rules allow an accused only one peremptory challenge.[43] Citing *Smart*, Chief Judge O'Roark recognized that "[a]s an amelioration of this limitation [on challenges], military law mandates military judges to liberally pass on challenges."[44] Thus, in order to maintain the military justice system's "separateness" and its credibility, trial judges must be more liberal in granting challenges for cause than their civilian counterparts.

Moyar is significant because of its holding that "the threshold for clear abuse of discretion in denying a challenge for cause is lower than has heretofore been articulated."[45] Many decisions in the past recognized the "special deference" given by appellate courts to the rulings of trial judges in the area of challenges. In *Moyar*, however, Chief Judge O'Roark, recognizing that some judges continued to grant challenges for cause only grudgingly, stated that the principle of liberality in granting challenges for cause is not just some "form of moral suasion to take or leave."[46] The close calls, in other words, should be made in favor of granting such challenges. The decisions of trial judges refusing to grant challenges for cause will clearly be subject to greater scrutiny on the appellate level, under *Moyar*, as the Army court of Military Review appears intent on enforcing liberal standards in the challenge for

[33] *Id.*

[34] *Id.*

[35] *Id.* at 18.

[36] *Id.* at 18–19.

[37] *Id.* at 19.

[38] *Id.*

[39] *Id.* at 19.

[40] *Id.* (Cox, J., Concurring).

[41] 24 M.J. 635 (A.C.M.R. 1987).

[42] *Id.* at 637.

[43] *Id.* at 636–37.

[44] *Id.* at 638.

[45] *Id.* at 639.

[46] *Id.*

cause area. Time, money, and effort are often wasted because of failures to grant challenges, and defense counsel should be quick to point this out to military judges.

Discriminatory Use of Peremptory Challenges

Another developing area of the law of voir dire stems from the Supreme Court's opinion in *Batson v. Kentucky.*[47] *Batson* dealt with the discriminatory use of peremptory challenges by the prosecution during the selection of panel members. In *Batson*, the Supreme Court studied its goal of removing racial discrimination from the courtroom and explained its rationale as follows:

> By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our nation, public respect for our criminal justice and the rule of law will be strengthened if we insure that no citizen is disqualified from jury service because of his race.[48]

The Court further held that *Swain v. Alabama*[49] was expressly overruled and that a systematic discriminatory use of peremptory challenges need not be shown. *Batson* held that the defense need only show a prima facie case to raise an inference of "purposeful discrimination."[50] The burden of persuasion is on the defendant. The trial court has the duty to determine if the defendant has established purposeful discrimination.

Only two military appellate courts have dealt with the *Batson* issue. The first was the Army Court of Military Review's decision in *United States v. Santiago-Davila.*[51] Santiago-Davila was a Puerto Rican and the trial counsel used his peremptory challenge to remove the only Puerto Rican member from the panel. With no individual voir dire conducted, trial defense counsel made a timely motion requesting the military judge to inquire into the apparently discriminatory use of the government's challenge. The military judge declined and the motion was denied without further discussion.

The Army court agreed with the military judge that no impropriety had occurred in the trial counsel's exercise of the government's peremptory challenge. In regard to *Batson*, the court stated:

> It is unlikely that *Batson* would apply to trials by court-martial, primarily because our systems allows only one peremptory challenge—a situation which simply does not permit the government an opportunity to *dramatically* change the composition of a court-martial (jury) through challenge. Even assuming that *Batson* would apply, there is no showing in the case, *sub judice*, of "purposeful discrimination," as required by *Batson.*[52]

The Army Court's view of *Batson* is indeed novel because it apparently assumes that the military justice system is insulated from racial discrimination.[53] In fact, the *Batson* decision strikes at the heart of any officially-sanctioned racial discrimination.[54]

The second part of the Army court's opinion in *Santiago-Davila* stated that there was no showing of "purposeful discrimination"[55] as required by *Batson*. The dirth of facts developed in the *Santiago-Davila* case makes this conclusion difficult to evaluate.[56]

In *United States v. Cox,*[57] a case decided by the Navy-Marine Corps Court of Military Review, the appellant was a black corpsman charged with committing sexual assaults upon three patients and a co-worker. Appellant chose to be tried by officer members before a general court-martial. After voir dire, the trial counsel peremptorily challenged the panel's lone black member. Immediately after the ruling, the court dismissed for the day. At the beginning of the next's day session, the defense counsel moved "that the exercise of a peremptory challenge to exclude the only black that would have been eligible for this Court was an unconstitutional exercise [of the government's peremptory challenge]."[58] The military judge denied the defense motion and refused to either call back the peremptorily challenged black member for individual voir dire or order the convening authority to substitute another black panel member.[59]

The Navy-Marine Court did not rule on the issues of whether *Batson* was applicable to courts-martial or whether *Batson* applied retroactively.[60] Instead, it ruled that even if *Batson* did apply to the case, the record did not reflect a discriminatory purpose on the part of the trial counsel in

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[47] 106 S. Ct. 1712 (1986).

[48] *Id.* at 1728.

[49] 380 U.S. 202 (1965).

[50] *See* Note, *Government Peremptory Challenges,* The Army Lawyer, Aug. 1986, at 63.

[51] CM 447830 (A.C.M.R. 6 Aug. 1986).

[52] *Id.*, slip op. at 2.

[53] *See* Kilgallin, *Prosecutorial Power, Abuse, and Misconduct,* The Army Lawyer, April 1987, at 19, 23.

[54] *Id.*

[55] CM 447830, slip op. at 2.

[56] The Court of Military Appeals has recently granted the petition on the *Batson* issue in *Santiago-Davilia,* 24 M.J. 55 (C.M.A. 1987). In granting review, the Court of Military Appeals seems to have agreed to address the question of whether *Batson* applies to the military. It is unclear whether prejudice will be found under the admittedly few facts in this case if *Batson* is held to apply.

[57] 23 M.J. 808 (N.M.C.M.R. 1986).

[58] *Id.* at 810.

[59] *Id.*

[60] *Id.* at 811. In Griffith v. Kentucky 107 S. Ct. 708 (1987), the Supreme Court chose to apply *Batson* retroactively to all cases, state or federal, pending, on direct review, or not yet final.

challenging the lone black member.[61] The court went on to state that even if the defense did establish such a prima facie case, government counsel came forward with a neutral explanation for his action.[62] There are two significant points regarding the *Cox* decision. First, the trial court did not have the benefit of the *Batson* case before it, describing the defense's need to show only a prima facie case to raise an inference of purposeful discrimination. Second, *Griffith v. Kentucky*[63] has since answered the question in the affirmative of whether *Batson* should be applied retroactively.

Additional Peremptory Challenges

An issue that has recently been revived on appeal is whether an accused is entitled to an additional peremptory challenge after new members are detailed to a panel.[64] This question arises when the defense's exercise of its peremptory challenge reduces the number of panel members below the jurisdictional minimum. In *United States v. Holley*,[65] the Court of Military Appeals, in an opinion by Judge Fletcher, stated that an accused is granted one and only one peremptory challenge, no matter how many new members are detailed to the panel. In dissent, however, Chief Judge Everett stated: "I believe that the judge is free to allow additional peremptory challenges if the parties stipulate that he may do so; and there may be situations where, in the exercise of his sound discretion and in order to assure a fair trial, the trial judge may allow additional peremptory challenges."[66] The Court of Military Appeals has apparently decided to reconsider this issue in *United States v. Wilson*.[67] Precisely what the outcome of this issue will be in *Wilson* is not easily predictable, although the strong dissent in *Holley* by Chief Judge Everett and the change in court membership may well indicate a change in the court's view on this issue.[68] When faced with newly detailed members after having used the peremptory challenge, defense counsel should ask for another peremptory challenge to make a record for appeal in the event *Wilson* modifies the law in this area.

Practical Considerations Regarding Voir Dire and Challenges

Questioning Court Members

Defense counsel should aim to avoid questioning prospective members in an ambiguous or contrived manner.[69] Counsel should normally ask several background questions. These include whether the prospective members or their close family have been the victims of the same crime or a similar type of crime. Defense counsel should also be concerned with asking questions that will enable them to wisely exercise their peremptory challenge. Normally, these questions include the prospective member's age, background, marital status, family members, and religious beliefs. Pretrial questionnaires containing this type of routine information are available from trial counsel.[70] While the information required in a questionnaire is not necessarily exhaustive, it should give defense counsel a starting point for meaningful exercise of the peremptory challenge.

The first impressions that court members have of defense counsel and the accused often occur immediately prior to and during voir dire. Members are not favorably impressed when they enter a courtroom and see counsel with their back to them shuffling through papers, or looking for exhibits. Such appearances do not convey a professional demeanor, and may well distract counsel from an important opportunity to observe prospective court-members. A confident and prepared appearance reflects a professional attitude and belief in the case from the start.[71] Counsel should avoid a lengthy introduction during voir dire and concentrate on the accused's case. Counsel's professionalism will speak for itself by conducting a thorough voir dire in a calm manner.

Challenges for Cause

United States v. Smart,[72] which stands for the proposition that military judge's should be liberal in granting challenges for cause, effectively encourages defense counsel to thoroughly probe for any indication that members may not be completely fair and impartial. This, however, does not always mean that a tortured or long voir dire is always necessary to develop a basis for a challenge. Once the defense has fully exposed the basis for a challenge for cause, further questioning could indeed backfire by giving the alerted member an opportunity to rehabilitate himself.

The mandate in *Smart* was reemphasized in *United States Moyar*.[73] *Moyar* indicates that the Army Court of Military Review believes that at least some trial judges have not been liberal enough in granting challenges for cause. Counsel should point out that the appellate courts are subjecting denials of challenges for cause to even greater scrutiny, and argue that in close cases challenges for cause must be granted.

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[61] 23 M.J. at 811.

[62] *Id.* at 811.

[63] 107 S. Ct. 708 (1987).

[64] *See* Note, *Peremptory Challenges*, The Army Lawyer, April 1987, at 25 [hereinafter *Peremptory Challenges*].

[65] 17 M.J. 361 (C.M.A. 1984).

[66] *Id.* at 372 (Everrett, C.J. dissenting).

[67] 19 M.J. 271 (C.M.A. 1985). In *Wilson*, an Air Force case, the Court of Military Appeals granted review and heard oral argument on the issue of whether additional peremptory challenges should be granted each time the convening authority adds new members to the court.

[68] *See Peremptory Challenges, supra* note 64, at 25.

[69] *See* United States v. Tippit, 9 M.J. 106 (C.M.A. 1980).

[70] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912(a)(1) [hereinafter R.C.M.].

[71] Ring, *Voir Dire: Thoughtful Notes on the Selection Process*, Trial, July 1983, at 72.

[72] 21 M.J. 15 (C.M.A. 1985).

[73] 24 M.J. 635 (A.C.M.R. 1987).

Discrimination in Peremptory Challenges

Trial counsel's discriminatory use of peremptory challenges has not yet been the source of much litigation. A suggested plan for litigating this issue is:

1. The defense counsel objects to the government's discriminatory use of a peremptory challenge for an improper purpose;

2. The trial judge gives the trial counsel an opportunity to respond;

3. The trial counsel gives his reasons (if any) for peremptorily challenging the member;

4. The military judge rules if the defendant has established purposeful discrimination; and

5. If the defense is unsuccessful, it should renew its objection for purposes of the record.

This suggested approach gives the defense a full opportunity to present its prima facie case based on the facts of the case at bar, thereby raising an inference of "purposeful discrimination." The military judge then asks for the trial counsel's response. This way the trial counsel's response would be immediate and not taken in an affidavit as in *United States v. Cox.*[74] The ruling by the military judge should review enough factual matters so that review of his decision is easily accomplished. Finally, for purposes of clarity and appellate review, defense counsel should renew its objections if the military judge should rule against the accused.

Preserving Error for Appellate Review

After making an unsuccessful challenge for cause, defense counsel must properly preserve the error for appellate review. To correctly preserve error, defense counsel must exercise the peremptory challenge against any party. Failure to use a peremptory challenge at all has been held to waive any issue as to denial of a challenge for cause.[75] If defense counsel wishes to peremptorily challenge a member who has been unsuccessfully challenged for cause, counsel must state on the record that he or she would have peremptorily challenged another member.[76] This requirement is designed to prevent a "windfall" to a party that had no intent to exercise its peremptory challenge against any other member.[77] Rule for Courts-Martial 912(f)(1) (A)–(N) describes the grounds for possible challenges for cause. Challenges for cause, while normally made upon completion of the voir dire examination, may be made at any time a basis for challenge becomes apparent.[78]

Conclusion

Vigorously litigating challenges developed from voir dire not only protects your client but also protects the military justice system. To conduct a successful voir dire, defense counsel must accomplish several tasks. First, defense counsel must know the case law dealing with voir dire. Second, defense counsel must question court members, gain information from them, and question them individually if needed. Third, defense counsel must articulate challenges for cause in the proper case. Fourth, defense counsel must recognize the possible discriminatory use of the government's peremptory challenge. Finally, defense counsel must preserve error for appellate review. Given the many disadvantages an accused faces, defense counsel must use every available opportunity to be an effective advocate for their client. Voir dire and challenges must not be neglected advocacy tools, but important tools for the prepared defense counsel.

[74] 23 M.J. 808, 810 (N.M.C.M.R. 1986).

[75] United States v. Henderson, 11 C.M.A. 556, 29 C.M.R. 372 (1960).

[76] *See* R.C.M. 912(f) analysis.

[77] R.C.M. 912(f)(4).

[78] *See* R.C.M. 912(f)(1).

American Presence at Foreign Searches, or "Trust Us, We're Here To *Help* You"

Captain Stephen W. Bross
Defense Appellate Division

Introduction

The presence of American criminal investigative personnel who accompany foreign authorities during searches of American soldiers and their quarters has been a ticklish judicial problem over the years. Foreign searches conducted in accordance with foreign law often fail to comply with procedural requirements of the fourth amendment.[1] At some point, U.S. involvement in these searches may become so substantial that fourth amendment protections will be triggered. The solution begins by first defining the actions of the American investigators and then weighing them against their stated purpose for being present at the search. One can then judicially articulate whether the search is truly a foreign law-enforcement act, or whether there is enough American involvement or participation to trigger fourth amendment protections.

The Court of Military Appeals seems to have fashioned a reasonable rule in *United States v. Morrison*[2] after some

[1] U.S. Const. amend. IV.

[2] 12 M.J. 272 (C.M.A.) 1982).

turbulence in its earlier cases.[3] The *Morrison* rule requires examination of the reason for American presence at the search—*i.e.*, is it for the benign purpose of protecting the soldier's rights or benign cooperation pursuant to a stationing agreement,[4] or is it instead designed to unlawfully evade the constraints of the fourth amendment by "using" the foreign authorities. While this appears to be a workable rule,[5] there are additional considerations not directly addressed in *Morrison* that may call for a refinement in the *Morrison* approach. This article examines whether law enforcement investigators can *ever* be expected to perform purely protective or cooperative duties under treaties such as the NATO SOFA while present at a foreign search, and suggests means by which defense counsel may challenge any such claim of benign participation.

Historical Development and Current Law

There is little question that American investigators and foreign authorities should cooperate in criminal investigations and assist each other within the broader framework of overall military cooperation. As an example, the NATO SOFA provides that "[t]he authorities of the receiving [foreign] and sending [U.S.] States shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense."[6] This obligation of assistance comes into play most often in the cases of concurrent jurisdiction, where the criminal acts violate laws of both the United States and the foreign state. As a practical matter, although the foreign state generally has the primary right to assert jurisdiction in these cases, that primary right will be waived in favor of the United States in the vast majority of cases.[7] Thus, "assistance" to the foreign investigators often amounts to advance case work on an American case by American investigators.

This obligation of assistance, and the independent responsibility of American officials to protect the interests of American soldiers undergoing foreign investigation, led the Court of Military Appeals, in *United States v. DeLeo*,[8] to hold that the mere presence of an American investigator at a foreign search did not trigger fourth amendment standards. The court explained that while such presence by a federal investigator during a state search would trigger the fourth amendment,[9] the legitimate and benign reasons why a federal official should be on the scene with foreign officials called for a different rule. Judge Latimer's dissent, however, pierced this generally sound principle with the factual conclusion that the American investigator had done much more than simply protect DeLeo from the vagaries and unfamiliar procedures of the foreign investigators.[10] Judge Latimer concluded that, in apprehending DeLeo, conducting a personal search incident to apprehension, and following the French investigators through a search of DeLeo's automobile and quarters,[11] the American investigator was there partially or wholly as an investigator, and not as a protector of DeLeo's rights as a U.S. citizen and soldier.

When the Court of Military Appeals next addressed the issue,[12] in *United States v. Jordan*,[13] it departed substantially from *DeLeo*. In *Jordan*, British authorities acting on their own traced and apprehended Jordan for suspicion of burglaries in the area. Acting on questionable consent by Jordan, the British investigator searched Jordan's room while accompanied by American personnel. The military policemen's only participation was to open a locked footlocker and obtain photographs of evidence found in the search, both at British request.[14] The court relied on *Mapp v. Ohio*[15] for its observation that the Supreme Court had elevated the exclusionary rule from a mere evidentiary device to a "positive command of the Constitution"[16] that protects U.S. citizens at all times. It therefore held that whether American officials had any role in or presence at a foreign search or not, the search would have to meet U.S. constitutional standards before evidence seized could be admitted in evidence at courts-martial.

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[3] United States v. DeLeo, 5 C.M.A. 148, 17 C.M.R. 148 (1954); United States v. Jordan (*Jordan I*), 1 M.J. 145 (C.M.A. 1975); United States v. Jordan (*Jordan II*), 1 M.J. 334 (C.M.A. 1976).

[4] For example, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953], 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

[5] "My Brothers cure this perceived harm with opinions that can only lead to uncertainty in the field. Any legal concept that is left to be decided *ad hoc* only at the appellate level is not a rule which can provide meaningful guidance to the trial bench or bar." United States v. Morrison, 12 M.J. 272, 279 (C.M.A. 1982) (Fletcher, J., concurring in the result) (footnote omitted).

[6] NATO SOFA, art. VII, para. 6(a).

[7] United States v. Schnell, 1 M.J. 94, 97 n.11 (C.M.A. 1975).

[8] 5 C.M.A. 148, 17 C.M.R. 148 (1954).

[9] *Id.* at 155, 17 C.M.R. at 155 (citing United States v. Byars, 273 U.S. 28 (1927)).

[10] *Id.* at 163, 17 C.M.R. at 163 (Latimer, J., dissenting).

[11] The U.S. investigator apparently observed the challenged slips of paper in a writing kit after the French investigator had already looked through the kit. *Id.* at 154, 17 C.M.R. at 154.

[12] The court decided a case involving the same general issue shortly before the first opinion in *United States v. Jordan*, without taking the opportunity to reconsider *DeLeo*. United States v. Schnell, 1 M.J. 94 (C.M.A. 1975). In *Schnell*, the court determined that under any standard the U.S. investigator's actions constituted clear participation in the search as a joint enterprise.

[13] 1 M.J. 145 (C.M.A. 1975) [hereinafter *Jordan I*].

[14] *Id.* at 147.

[15] 367 U.S. 643 (1961). Note that the Supreme Court's original purpose for the exclusionary rule—to deter police misconduct—has been weakened by recent cases permitting use of evidence obtained by police acting in good faith. *See* United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984); Mil. R. Evid. 311(b) analysis.

[16] 1 M.J. at 148.

This harsh result, and Judge Cook's dissent in *Jordan I*,[17] led the government to petition successfully for reconsideration of this decision. In the resulting opinion, the court held that compliance with the fourth amendment would not be required in a *pure* foreign search, *i.e*, where American officials were not present at the search and had not otherwise instigated or contributed in any way to its execution.[18] The court noted the government's concern that its initial decision would lead to more trials of U.S. soldiers in foreign courts, which would be contrary to the congressional policy that, to the greatest extent possible, U.S. soldiers overseas be tried in U.S. courts.[19] The court also expressed the view that a U.S. exclusionary rule could have no deterrent effect on foreign police. In considering the *DeLeo* standard, the court recognized the great temptation to American officials to evade the fourth amendment by delegating search responsibility to their foreign counterparts, and so the court abandoned the concept of the protective function of an American presence at a foreign search in favor of a rule more strongly protecting soldiers' constitutional rights.[20]

When the Military Rules of Evidence[21] were adopted in 1980, Mil. R. Evid. 311(c)(3) provided in part that:

> A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

The drafters explained[22] that the rule was based on *Jordan II* and sought to prohibit unlawful subterfuge activities while permitting the presence of American observers to further international relations and provide services of benefit to an accused. These last provisions are derived directly from *DeLeo*, although it was not cited by the drafters.

In 1982, the Court of Military Appeals decided *United States v. Morrison*,[23] which represented a compromise of sorts between *DeLeo* and *Jordan II*. In *Morrison*, the court concluded that U.S. officials can be present at a foreign search as long as their presence is benign as envisioned in *DeLeo* and not a subterfuge as feared in *Jordan II*.[24] Judge Fletcher concurred in the result of the majority, but chastised them for requiring case-by-case review in an area that had enjoyed certainty under *Jordan II*.[25] It should be noted that the American officials in *Morrison* simply made inquiries to German authorities that led to a search by the Germans at which no American officials were present. Thus, the court's language in *Morrison* about American presence at the search was not necessary to resolve the issue presented to the court.

Analysis

Surprisingly, the recent cases have not given any consideration to Judge Latimer's dissent in *DeLeo*. His argument that the American investigator can abuse his or her position by acting more as an investigator than as a guarantor of an accused's treaty protections certainly illuminates *Morrison's* bare two-pronged analysis. Indeed, the cases that arise will most likely involve an American investigator who, while not intentionally staging a foreign search to evade the fourth amendment, is also not acting exclusively as the "guardian angel" of the accused.

More generally, one may well question whether an American military policeman or criminal investigator can ever realistically be expected to act solely in the interests of a criminal accused. The majority in *DeLeo* did not consider this question, and the dissenting opinion did not reach it as it concluded that the investigator had not acted on behalf of the accused in that case. First of all, an investigator on duty is mentally prepared for criminal investigation, and expects to be acting as an investigator even if merely "observing" a foreign search. It is very likely the investigator sees his or her role as purely assisting foreign officials pursuant to a treaty obligation.

Second, it is questionable whether law-enforcement personnel receive sufficient training to ensure adequate assistance to accused U.S. personnel without straining everyday international working relations. It may be too much to expect investigators, who are otherwise required to render cooperation and assistance to their investigative counterparts, to occasionally challenge those colleagues if necessary in the interest of the accused.

Third, as the court in *Schnell* observed, most investigators with any experience will know that the foreign authorities routinely forego their primary right to exercise jurisdiction.[26] An American investigator present at a foreign search might feel compelled to observe events as an investigator and prepare for the almost-certain military disciplinary action in order to avoid the appearance of dereliction of duty.

A realistic analysis of the role of the American investigator at a foreign search therefore indicates that the *Morrison*

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[17] *Id.* at 149 (Cook, J., dissenting).

[18] United States v. Jordan, 1 M.J. 334 (C.M.A. 1976) [hereinafter *Jordan II*].

[19] *Id.* at 336 nn.2–3.

[20] *Id.* at 337, 338.

[21] Manual for Courts-Martial, United States, 1984, Part III & appendix 22 [hereinafter MCM, 1984].

[22] MCM, 1984, at A22–16.

[23] 12 M.J. 272 (C.M.A. 1982). Note that the court earlier discussed, without deciding the issue, whether the rule announced in *Jordan II* for fourth amendment issues should be applied in a fifth amendment context where a U.S. soldier is made available to foreign authorities for questioning without prior warnings pursuant to Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831 (1982). United States v. Jones, 6 M.J. 226 (C.M.A. 1979). *Compare Jones with* the recent related development in United States v. Vidal, 23 M.J. 319 (C.M.A. 1987), *cert. denied*, 107 S. Ct. 2187 (1987) (request for counsel made to German official during German investigation not imputed to American investigators who subsequently obtained statement pursuant to waiver of rights).

[24] 12 M.J. at 279.

[25] *Id.* at 279–80 (Fletcher, J., concurring in the result).

[26] *Schnell*, 1 M.J. at 97 n.11.

inquiry into the "benign purpose" of that presence may need to encompass Judge Latimer's concerns in *DeLeo* to be effective. Such an analysis highlights matters that apparently have not been considered in the recent cases, although the language in the proviso to Mil. R. Evid. 311(c)(3) seems to recognize these concerns.

Practice Pointers for Defense Counsel

The job of a defense counsel faced with incriminating evidence from a putative foreign search at which American investigators were present is to investigate carefully what happened during the search. Of course, sometimes American participation will be clear from the degree of "assistance" provided by the American officials.[27] In those other cases where the American officials are less active, however, it may be possible to seriously challenge the fiction that the Americans are present to help the accused by conducting an additional focused investigation.

Look into the background and knowledge of the American officials. Determine whether they are familiar with the routine waiver of jurisdiction, and whether they expect to handle most cases regardless of initial foreign involvement. Probe their understanding of jurisdictional specifics—investigators may misunderstand the exact relationship between U.S. and foreign investigations even if they profess a general awareness. For example, these personnel often develop black-and-white rules about areas of jurisdiction which, while easy to apply, may be either wrong or at best incomplete. Any such misunderstandings or incorrect "rules" permit the argument that the investigator who does not understand the overall scheme is unlikely to understand his or her own specific role during a foreign search.

Find out what the investigators know about status of forces agreements and the rights of U.S. soldiers under them. If they have only limited knowledge of the applicable agreement, they are obviously ill-equipped to help an accused soldier no matter how much they try. Have them explain their perception of their role at the search. Most law-enforcement personnel will probably have no idea they were on hand to assist the accused.[28] As an objective matter, the absence of communication with the accused about treaty rights and protections could imply an investigative presence. The taking of notes by the investigator about the search could also imply an investigative presence for purposes of official reports and possible future testimony.

Find out whether the American investigators considered the possibility of unexpected events that would require further operations to comply with American standards. For example, the discovery of stolen military property during a foreign search would be evidence of a purely military crime over which U.S. authorities have exclusive jurisdiction. If the Americans anticipated this or similar events and were prepared to actively deal with them on terms mutually agreed with the foreign officials, the defense may argue that the American investigators clearly approached the search as an investigation. If on the other hand the American officials did not discuss such possible developments with their foreign counterparts, it is more likely they were present solely to protect the accused's interests.

Look into the relationship between the U.S. and foreign investigators. Find out if they worked together in the past, whether they socialize together, and whether they have discussed their own rules and who has the most lenient rules. Eliciting evidence of past relationships and discussions may lead not only to an argument that the American investigator's friendship with his or her counterparts would prevent the American investigator from protecting the accused's interests, but also to discovery of a subterfuge in the present case.

Find out if there was a legitimate basis to conduct a U.S. search, and if so, why the search was carried out by foreign officials. Again, if there was a legitimate U.S. basis, this may imply that American investigators were there to take advantage of more lenient foreign search and seizure procedures. An unconvincing explanation as to why U.S. officials elected not to seek a search authorization from a military magistrate or the soldier's commander may be a further indication that the foreign search is a subterfuge.

Find out whether U.S. equipment was used, and if so, why. In *United States v. Baker,*[29] German police, who were observing a German drug dealer, used an American Criminal Investigation Division (CID) vehicle and driver because the suspect was familiar with German police vehicles. After Baker bought hashish from the German suspect, the German police apprehended him and seized the hashish. The court held that loaning the CID vehicle and driver did not constitute an American search or seizure under the facts presented because the investigation was not instigated or participated in by the Americans. The presence of the American driver, a military policeman, was adequately explained in the record as merely for the protection of the U.S. property involved. This may be less persuasive if two or more American investigators are present for purposes of "protection."

Conclusion

There is more to the analysis of a foreign search with an American presence than meets the eye in *Morrison.* Defense counsel should be quick to exploit any facts that show investigative rather than "benign" American presence, even if the presence is not part of an active subterfuge. The analysis of Judge Latimer in *DeLeo* is still reasonable, and should guide counsel in making a record for appellate review. The Court of Military Appeals may not return to the rule of *Jordan II,* but careful advocacy and a good fact pattern may prevent the government from reaping the full benefit of a "foreign" search that is not *purely* a foreign search.

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[27] *See* United States v. Schnell, 1 M.J. 94 (C.M.A. 1975); United States v. Holland, 18 M.J. 566 (A.C.M.R. 1984).

[28] This circumstance could easily be corrected by careful training and supervision of investigators as to their duties during a foreign search, which would clearly legitimize their presence under the *Morrison* rationale and thereby ensure both admissibility of evidence and maximum U.S. jurisdiction in line with U.S. congressional policy. Defense counsel should not hesitate to highlight any failure of the investigative command to provide this training, and to argue that this failure is clearly inconsistent with the *Morrison* rationale of a benign presence. To the extent any such failure impedes maximum U.S. jurisdiction by creating uncertain legal issues, it is a self-inflicted wound.

[29] 16 M.J. 689 (A.C.M.R. 1983). Note that American personnel have been treated as agents of the foreign authorities when conducting border customs searches. United States v. Pereira, 13 M.J. 632 (A.F.C.M.R. 1982).

Timely and Specific Objections Required

The Army Court of Military Review recently reiterated the position that counsel must make timely and specific objections to preserve an issue for appellate review. In *United States v. Schwarz,*[1] the court ruled that a Mil. R. Evid. 403 objection was waived as defense counsel's objection was not made with specificity nor was its specificity readily apparent from the record in the context in which the objection was made.[2]

In *Schwarz*, the accused had been found guilty, inter alia, of destroying an Army ambulance while driving drunk. Immediately prior to the sentencing arguments, the trial counsel requested the military judge to judicially notice the fact that the government was limited to reimbursement of only one month's basic pay from the accused pursuant to report of survey procedures under Army Regulation 735–11.[3] The trial counsel wanted to enter this fact as evidence of financial impact pursuant to Rule for Courts-Martial 1001(b)(4).[4] The defense counsel objected to the request because some officers on the panel had indicated that they were familiar with report of survey procedures and for the judge to judicially notice this fact would bring unnecessary attention to it. Without stating his reasons, the judge overruled defense counsel's objection. On appeal, Schwarz asserted that a timely and specific objection under Mil R. Evid. 403 was made by his defense counsel at trial. The Court agreed that the objection was timely. Without stating any reasons, however, the court held that the trial defense counsel's objection did not constitute a specific Mil. R. Evid. 403 objection and that Mil. R. Evid. 103(a)(1) objection requirements were thus not met. The court stated: "We have repeatedly warned counsel to make specific Mil. R. Evid. 403 objections. . . . We refuse to weaken further our adversarial judicial system merely to accommodate inartful and unscientific use of the valuable tools provided by the military's modern evidence rules."[5] Accordingly, the court found that the Mil. R. Evid. 403 objection was waived.

The court cited *United States v. Williams*[6] in support of its holding. The court in *Williams* allowed a defense witness, over defense counsel's objection, to testify on cross-examination about the victim's truthfulness. The defense counsel's objection was that there was insufficient basis for the opinion. The Army court determined that the military judge did not abuse his discretion in allowing the testimony of the witness over the limited objection of defense counsel based solely on lack of "sufficient basis." Using this opportunity to advise counsel to comply with the requirements of Mil. R. Evid. 103(a)(l), the court stated that the objection at trial was not specific enough to preserve a potential Mil. R. Evid. 403 issue on appeal.[7]

Two other noteworthy cases have recently addressed the timely and specific objection issue. In *United States v. Jones,*[8] the defense counsel objected on uncharged misconduct grounds to the testimony of the acccused's first sergeant during the government's case in aggravation that the accused "liked to run the streets, he didn't like the Army and he didn't want to be in the Army."[9] The court stated it is well-settled in law that an accused waives objection to the admission of evidence at trial if he fails to make a timely and specific objection. The court further stated the requirement that an objection be specific contemplates that it be unambiguous, clearly stated or evident in the context in which it is made, and pertinent to the evidence challenged.[10] Because the defense counsel's objection at trial failed to meet these standards, the Army court held that the objection was waived on appeal for lack of specificity.

The Court went even further in *United States v. Hooks*[11] when it found that trial defense counsel's failure to make a timely and specific objection during presentencing constituted waiver. The court stated: "We believe waiver provisions should be *strictly enforced* during presentencing proceedings, as errors then arising normally as (sic) can be obviated or corrected when timely called to the military judge's attention."[12] In *Hooks*, the defense counsel failed to object to statements made during presentencing and during trial counsel's sentencing argument regarding the impact the accused's kidnapping and rape had upon German-American relations.

The foregoing cases indicate it is not sufficient to merely state an objection, to object on incorrect grounds, or to state an objection on overbroad grounds. For example, in *Williams*, the defense counsel should have specifically stated that he was objecting on Mil R. Evid. 602 and 608 grounds that the witness had not testified to facts indicating he had sufficient personal knowledge to form an opinion as to the victim's credibility. In *Hooks*, the defense counsel may have been successful in objecting to statements made in presentencing and during the trial counsel's sentencing arguments if he had stated that no foundation had been laid regarding the impact of the accused's conduct on German-

[1] 24 M.J. 823 (A.C.M.R. 1987).

[2] Mil. R. Evid. 103(a)(1).

[3] Dep't of Army, Reg. No. 735–11, Property Accountability—Accounting for Lost, Damaged, or Destroyed Property, para. 4–18*b*(2) (1 May 1985).

[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4).

[5] 24 M.J. at 825 n.4.

[6] 23 M.J. 792 (A.C.M.R.), *petition filed,* 24 M.J. 67 (C.M.A. 1987).

[7] *Id.* at 796 n.9.

[8] 24 M.J. 827 (A.C.M.R. 1987).

[9] *Id.* at 829.

[10] *Id.*

[11] 24 M.J. 713 (A.C.M.R. 1987).

[12] *Id.* at 718 (emphasis added).

American relations and that these statements were based on facts not already in evidence.

In light of recent case law, it is obvious that the appellate courts are not going to consider, absent plain error,[13] assignments of error in areas where a defense counsel should have made a timely and specific objection at trial but failed to do so. Preserving issues with timely and specific objections does not assure successful appeals. Counsel must be active and accurate at trial, however, in order to vault the "waiver" hurdles now being used by appellate courts. Captain Wayne D. Lambert.

Ineffective Assistance: The Other Shoe Has Dropped

Defense counsel should already be aware that incompetent advice causing an accused to plead guilty and waive his rights to trial, confrontation, and against self-incrimination has been held to be a deprivation of the sixth amendment right to the effective assistance of counsel.[14] Now, the other shoe has dropped at the opposite end of the spectrum with the holding of a federal district court in *Turner v. Tennessee*[15] that incompetent advice to *reject* a pretrial agreement and contest a case can also constitute ineffective assistance of counsel.

Turner was charged with first-degree murder and two counts of aggravated kidnapping. He was represented by two counsel. The government made several plea offers to Turner with the goal of finding the victim's body. The last offer was a two-year unsuspended sentence in return for a plea of guilty to a felony. One of Turner's counsel urged him to take the deal. Turner, relying on the representation of his lead counsel that his prospects at trial were good, counteroffered for a one-year sentence. The counteroffer was rejected and the case went to trial. Turner was convicted and sentenced to life imprisonment on the murder count and to two forty-year sentences on the kidnapping counts. The advice of lead counsel was found to be incompetent. The court pointed out that incompetent advice of counsel is offensive under the sixth amendment whether resulting in a plea of guilty or not guilty.

The decision in *Turner* indicates that trial defense counsel should consider taking steps to protect themselves in cases where a client is offered nonjudicial punishment, administrative elimination, or a favorable pretrial agreement, yet insists on contesting the case at court-martial. This is especially true if, for whatever reason, the client ultimately does not testify to his or her innocence at trial. In such cases, counsel should make a contemporaneous memorandum for record or other document showing that the client chose to contest the case despite counsel's advice to accept nonjudicial punishment or alternate disposition of the case such as a discharge for the good of the service or a guilty plea with a pretrial agreement. Major Jon W. Stentz.

Follow That *Byrd:* Raising Mere Preparation and the Defense of Voluntary Abandonment

In *United States v. Byrd*,[16] the accused was convicted pursuant to his pleas of attempted distribution and possession of marijuana based on his acceptance of ten dollars from an undercover agent and a trip to a liquor store where drugs could be purchased. The accused did not purchase the marijuana, however, for fear of being caught and the effect drug dealing would have on his good name. He instead used the money to purchase some liquor. The Court of Military Appeals reversed appellant's conviction, stating that the accused's acts as recounted in the stipulation and providence inquiry only amounted to mere preparation and therefore failed to establish an attempt. In so deciding, the court clarified the difference between "preparation" and "overt acts," the latter being a necessary element to support conviction for attempt. An overt act must be a "substantial step toward the commission of the crime," one which is "strongly corroborative of the firmness of the defendant's criminal intent."[17]

Chief Judge Everett[18] also addressed the concept of voluntary abandonment, recognizing it as an affirmative or special defense to charges of attempted criminal conduct in courts-martial. He endorsed the Model Penal Code definition of the defense.[19] In order to successfully assert the abandonment defense, the accused must make a complete and voluntary renunciation of his or her criminal purpose. This renunciation must be due to a change of heart and cannot be based on new or previously unknown circumstances that increase the probability of detection or make execution of the crime more difficult. Similarly, desisting from final consummation of the offense by reason of fear of apprehension is insufficient to raise the defense of voluntary abandonment.[20]

When trial defense counsel are faced with facts similar to *Byrd*, they should first argue that no crime occurred as the accused's acts constituted mere preparation. Additionally, the accused's innocence should be asserted if his or her acts raise voluntary abandonment even though an overt act has occurred.[21] Captain James J. McGroary.

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[13] *See* United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

[14] Hill, v. Lockhart, 474 U.S. 52 (1985); McMann v. Richardson, 397 U.S. 759 (1970).

[15] 41 Crim. L. Rep. (BNA) 2296 (M.D. Tenn. June 12, 1987).

[16] 24 M.J. 286 (C.M.A. 1987).

[17] *Id.* at 290. This test was first articulated in United States v. Jackson, 560 F.2d 112, 116 (2d Cir. 1977), *cert. denied*, 434 U.S. 941 (1977).

[18] The *Byrd* decision does not represent a clear majority position. Chief Judge Everett wrote the lead opinion with Judge Cox writing separately. Judge Cox concurred in the results, but refused to adopt a new rule of substantive law where it had not been fully litigated below. 24 M.J. at 293. Judge Sullivan did not participate in the decision.

[19] Model Penal Code § 5.01(4) (1962).

[20] 24 M.J. at 292–93.

[21] The defense of voluntary abandonment is also referred to as the doctrine of *locus poenitentiae*. *Id.* at 290.

CID ROI: Your Client and the Title Block

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Imagine this: One day the local office of the U.S. Army Criminal Investigation Command (USACIDC or CID) calls you at your TDS office. CID has been investigating your client, a warrant officer, on criminal charges and your client invoked his rights when they attempted to question him. CID has just about finished their investigation and they want to "brief" the warrant officer on the results of their investigation. Intrigued, you set up a briefing in your office, taking care to ensure that information flows only one way. After setting forth the case against your client, the CID agents come to the heart of the matter: they want your client to take a polygraph. If your client passes the polygraph, he will not be titled; if he does not take the polygraph or fails it, he will be titled and "have a criminal record." Aside from advice about the dangers of the polygraph itself, what can you say to the client about the effects of titling and the best way to deal with it? This article discusses the CID Report of Investigation (ROI) titling decision and how to contest the titling decision.

The Titling Decision

One of the final steps in the CID investigation process is a determination that probable cause exists to believe that a soldier committed a certain crime and that the soldier should be "titled" in the final ROI.[1] Prosecutors and other legal advisors provide guidance to the CID concerning the final titling determination, but the decision rests with the CID and is made without benefit of adjudication of guilt. Other than actual courts-martial convictions and Article 15[2] results, the CID ROI is the only important source of information on finalized criminal cases accessible outside the U.S. Army law enforcement system.[3] The CID ROI is maintained for forty years at the U.S. Army Criminal Records Center (CRC).[4] If the CID decides not to title an individual or the individual's name is later removed from the title block, some of the information may still be retained. This information, however, is generally not retrievable by name or social security number and thus is rarely distributed outside of Army law enforcement circles.

Unlike civilian practice, the CID does not at present maintain records of arrests or apprehensions. When state and local law enforcement agencies make an arrest, the suspect is often fingerprinted and reported to the Federal Bureau of Investigation's (FBI) National Criminal Information Center (NCIC), a national, easily accessible, computerized data base. The arrest record alone becomes a criminal record. Although a move is afoot to bring the Armed Forces more in line with civilian practices in this area, for now the CID ROI presents the most significant danger to the military client as a negative source of information on alleged criminal conduct investigated by CID.[5]

What Does Titling Mean to Your Client?

The client is immediately concerned with how titling will affect his or her military career and whether titling will affect subsequent civilian employment opportunities. Appendix A of this article lists may receive the CID ROI.[6] The following are the most important points from the diagram.

First, many military occupational specialties (MOS) and career fields require some type of security clearance. This is also true of many government related civilian jobs. If a soldier is in a position requiring a clearance at the time of the CID investigation, the information collected in the investigation must be reported up security channels by both the commander and the CID. If the soldier applies for a security clearance at some point after the investigation is finalized, the security agency may obtain the client's ROI. DOD investigating agencies have on-line computerized access to the Defense Central Index of Investigations (DCII). The soldier's name, and the fact that he or she was titled in an ROI for some crime, will appear in the DCII. A simple follow-up request to CRC by the security agency will then produce the unabridged ROI. As a result, a soldier who thought everything had been cleared up months or years prior, when charges were dropped, will face the difficult task of having to rebut the old, cold allegations once again.

Secondly, CID ROI information may be included in the soldier's official military personnel file (OMPF) upon command-initiated referral or referral by a security agency. The

[1] U.S. Army Criminal Investigation Command, Reg. No. 195–1, Operations, para. 7–6 (1 Nov. 1986).

[2] Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1982) [hereinafter UCMJ].

[3] Unless otherwise noted, information in this article was provided by personnel at the USACIDC headquarters and the U.S. Army Crime Records Center (CRC).

[4] Dep't of Army, Reg. No. 340–21–1, Office Management—The Army Privacy Program: System Notices and Exemption Rules, para. 6–14 (16 Dec. 1985).

[5] Other criminal investigative information is maintained and distributed aside from the finished ROI. The U.S. Disciplinary Barracks (USDB) must report certain *convictions* and send fingerprints to the FBI (Dep't of Army, Reg. No. 190–47, Military Police—The United States Army Correctional System, para. 5–2 (1 Oct. 1978)). The same paragraph requires the USDB to report certain offenses to the FBI when charges are preferred but are dismissed short of conviction or acquittal; however, the USDB is usually not informed of these situations. The Department of Defense Inspector General's office (DOD IG) has mandated reporting certain offenses upon decision to take criminal action (Memorandum from Inspector General, Department of Defense, to Secretaries of the Armed Forces, 25 Mar. 1987, subject: Criminal Investigations Policy Memorandum Number 10—Criminal History Data Requirements). The Army implemented the DOD IG policy on 1 October 1987 (CID Memorandum, 21 July 1987, subject, Criminal History Data Reporting Requirements).

[6] The appendix has its own notes for use as a self-contained reference.

soldier must be given an opportunity to rebut the information prior to the final filing decision. The CID takes no role in this procedure.

Finally, the soldier may decide to become a civilian one day and seek civilian employment. The chances of a prospective employer getting the ROI information vary, depending on whether the work is with another federal agency, a state or local agency, a contractor doing business with the government, or another private employer. Government-related employers have various avenues for obtaining the information; however, the Freedom of Information Act (FOIA)[7] is a powerful tool for *every* prospective employer. Some employers, including private agencies formed to help private companies evaluate employment applications, make FOIA requests for CID records on a routine basis. The requirements of FOIA, even after balancing against Privacy Act[8] requirements, often result in the release of most of the information in the CID report. This will include the suspect's name, alleged offenses, witness statements, and statements by the suspect. Statistics kept by CRC indicate that release of this information does have an impact. Roughly one quarter of all requests for deletion from the title block ("amendment requests") come from Army personnel who have separated from the service since the ROI was completed. Common sense suggests that employment problems are spurring these amendment requests.

How Does the Amendment Process Work?

An amendment request is prepared in the following manner.[9] First, the soldier must obtain the ROI itself. If the soldier did not receive a copy during the course of the investigation/adjudication process, the soldier can ask his or her commander or the local staff judge advocate (SJA) for a copy. If that avenue is not available, the soldier may send a notarized request under the provisions of the Privacy Act. Address it to: Freedom of Information Act/Privacy Act Officer, U.S. Army Crime Records Center, 2301 Chesapeake Avenue, Baltimore, Maryland 21222–4099. At a minimum, the soldier should provide his or her name, social security number, the nature of the offense for which titled, and the time and place of occurrence. The soldier should also agree to pay any costs of reproduction, if they are not waived by the CRC.

Second, the soldier should prepare a request in letter format, and clearly indicate that he or she is requesting an amendment to the title block of the ROI. The soldier must provide "new, relevant, and material facts" in order for the request to be considered.[10] Although this requirement is not stringently applied, a failure to provide new witness statements or other evidence not in the final ROI, will cause the CRC to hold the request for thirty days while they contact the soldier for additional information. The request should be sent to the CRC (address above), ATTN: CICR–FP.

Third, after thirty days have elapsed, the CRC will continue to process the request, regardless of whether the soldier has actually supplied any "new, relevant, and material facts." CRC will keep the original request and send copies of the request to the CIDC SJA and to the CIDC Investigative Operations section.[11] All three directorates will then form opinions as to whether the soldier should be removed from the title block. The SJA concentrates on whether there is sufficient evidence legally to establish probable cause. The Investigative Operations section focuses on the investigation itself, looking for undeveloped leads, unexplained delays in interviewing witnesses, and other indicators of incomplete police work. Should additional investigation be needed, Investigative Operations may order more investigation and delay its final review of the request until further inquiry is completed.

Fourth, when all the parties have concluded their reviews, and are in agreement, the Chief, CRC will sign off on the decision and notify the soldier. If there is any disagreement among the reviewers, each prepares a memorandum in support of its position and the Deputy Commander, USACIDC, makes the final decision. If the request is denied at either level, there is no further review. Previous recipients of the ROI are also notified by CRC if there is any amendment to the ROI. Although the whole process can take as little as thirty to forty days, a failure to provide new information, a need for additional investigation, or disagreement among the reviewers can increase the processing time to five months or longer.

Finally, is it worthwhile to request amendment? CRC statistics indicate that fifty-two amendment requests were received during 1986. At the time this article was prepared, forty of these requests had been processed to completion with thirteen individuals being entirely removed from the ROI title block.

What Factors Should Be Considered When Preparing an Amendment Request?

Discussions with personnel in all three reviewing directorates resulted in several practical suggestions for preparing a request:

1. *DO* request amendment, if at all, as soon as practical. The passage of time leaves rebuttal evidence stale and difficult to obtain. Additionally, the ROI may circulate farther and farther afield as time passes (see appendix). CRC keeps careful records on all recipients of the ROI and will notify those recipients if the client is deleted from the title block. It is impossible to know, however, whether the deletion notice is passed on to second and third echelon ROI recipients.

2. *DO* submit as much new, documented, factual material as possible. Remember, it must bear on probable cause. Past requests have been granted based on: statements by key witnesses never interviewed by CID; evidence directly impeaching the primary accuser; and, a sworn statement by the subject himself (where the subject never actually rendered a statement during the investigation). Each case is

[7] 5 U.S.C. § 552 (1982).

[8] 5 U.S.C. § 552a (1982).

[9] Dep't of Army, Reg. No. 195–2, Criminal Investigation—Criminal Investigation Activities, para. 4–4 (30 Oct. 1985) [hereinafter AR 195–2]; *see also* U.S. Army Criminal Investigative Command, Reg. No. 195–16, Release of Information and Amendment of Records (20 Feb. 1981).

[10] AR 195–2, para. 4–4*b*

[11] If the final ROI is less than three years old, current CID policy is to allow the field office equal input into the reviewing process.

dependent on its own facts of course, and these examples are not all inclusive.

3. *DO* consider having the client take a CID polygraph examination. The CRC itself has polygraph facilities and is staffed by experienced polygraph examiners, so in most cases they will agree to support removal from the title block based solely on passing a polygraph test by a CID examiner. Tests administered by private examiners generally will not be considered, however. Before requesting a CID polygraph, defense counsel should seriously consider both the possibility of damaging admissions by the client during the polygraph and the devastating impact on the request if the polygraph results read "deception indicated." In particular, counsel should be aware of scientific analysis [12] indicating that the polygraph examination is very good at failing liars, but also may fail a large percentage of truth tellers.

4. *DO* consider an amendment request if you can point out a fatal flaw in the ROI's probable cause logic, even if there are no new, relevant, and material facts. The CRC will process the request eventually, and the majority of successful requests result from flaws in the ROIs (as opposed to new evidence).

5. *DO NOT* base the amendment request solely on the fact that the soldier was acquitted, charges were dismissed, or that nothing at all was ever done to the soldier. The initial decision to list a person's name in the title block of the CID ROI is an investigative determination that is independent of whether subsequent judicial, non-judicial, or administrative action is taken against a soldier. When CID receives an amendment request, they are still operating on the probable cause standard. The know that a commander's disposition can be influenced by factors irrelevant to probable cause (*e.g.*, the departure of material witness from the Army) and the courts-martial conviction standard of "beyond a reasonable doubt" is much more strict than probable cause. In addition, information irrelevant to the probable cause determination, such as character references, is entirely disregarded.

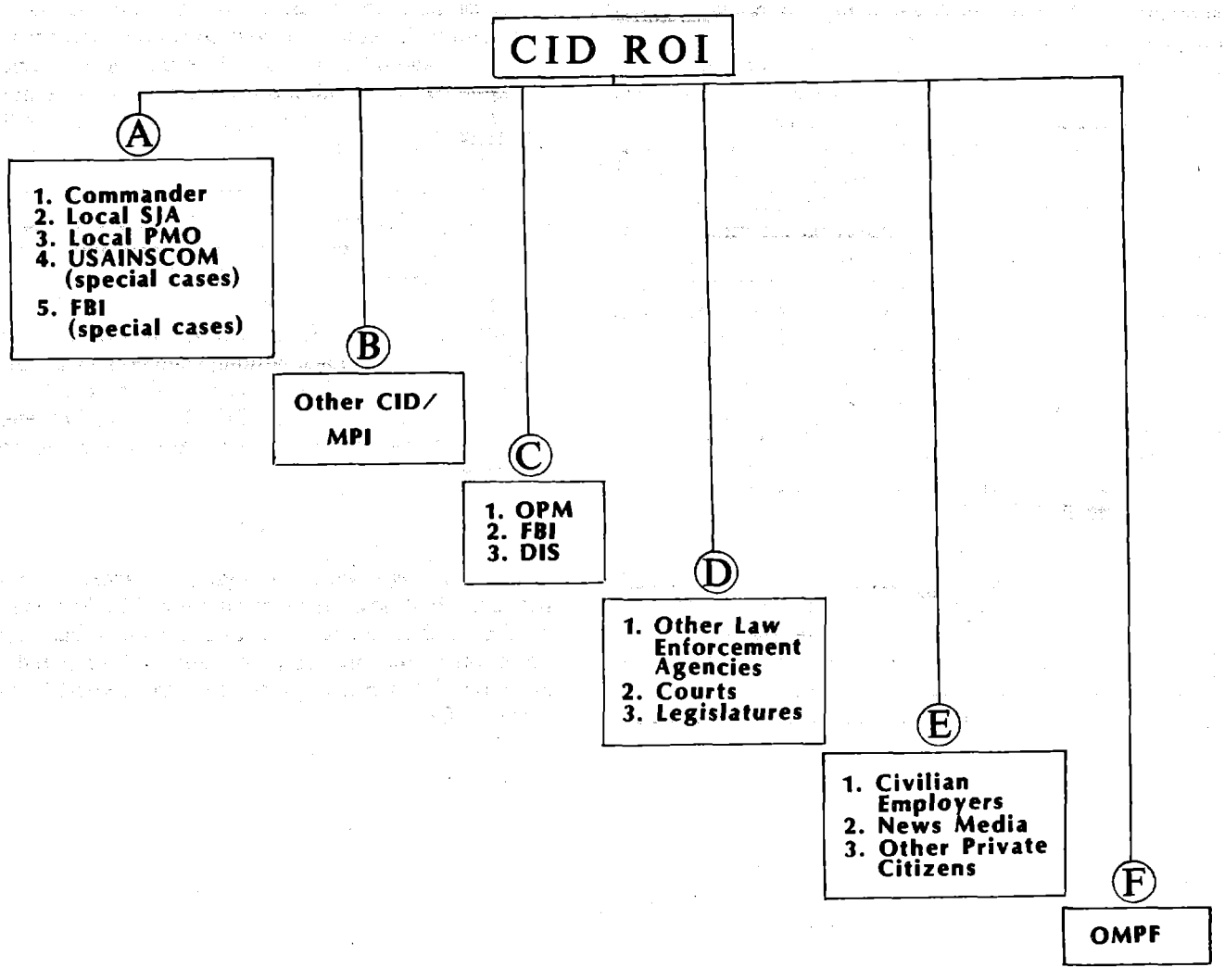
6. *DO NOT* request amendment before making a determination that additional CID investigation will not hurt the client. If the client is still in the military, and the statute of limitations has not run out on the offenses, explore the ROI with the client to see if undeveloped leads could still result in prosecution. CID Investigative Operations does order follow-up investigations, although subsequent UCMJ action seems unlikely for all but exceptional cases. Also, remember that information in a CID ROI can be referred to federal and state prosecutors for use in civilian courts at any time.

Conclusion

When a client walks through your door, he or she deserves the best possible representation. The ROI is a hidden timebomb that can blow up in the client's face months or years down the road. A timely and well-prepared amendment request, when appropriate, can succeed in avoiding future pitfalls.

[12] An interesting book for defense counsel sets forth the theory behind the "Lie Control Test" (the version of the polygraph most frequently employed by CID), the important assumptions inherent in the theory, and the scientific studies undermining the theory. D.F. Lykken, A Tremor in the Blood, 109–27 (1981).

Appendix A: Potential distribution of information from the CID ROI



Notes

A. The ROI, or information from it, is supplied without request to the:
1. Commander (Dep't of Army, Reg. No. 195-2, Criminal Investigation—Criminal Investigation Activities, para. 4-3c (30 Oct. 1985) [hereinafter AR 195-2]);
2. Local SJA (AR 195-2, para. 4-3c);
3. Local Provost Marshal (AR 195-2, para. 4-3c);
4. U.S. Army Intelligence and Security Command, for "any person having access to classified defense information." (AR 195-2, para. 1-5i); and
5. FBI (and Assistant United States Attorney): for all significant allegations of bribery, conflict of interest, espionage, and sabotage (Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 2-7 (1 July 1984); and NCIC for all deserters and certain stolen property to include vehicles and weapons (AR 195-2, para. 3-17c; Dep't of Army, Reg. No. 190-27, Military Police—Army Participation in the National Crime Information Center (NCIC) (6 May 1974)).

B. A telephonic or computerized "name check" by any Army CID/military police investigator will result in the release of the ROI (AR 195-2, para 5-4).

C. All criminal activity of interest to U.S. Government agencies will be reported to them (AR 195-2, para. 1-5k(5)). This includes information necessary for decisions on hirings, firings, security clearances, contracts, licenses, grants, and other benefits (Dep't of Army, Reg. No. 340-21, Office Management—The Army Privacy Program, para. 3-2c (5 July 1985). In practice, the Office of Personnel Management, FBI, and Defense Investigative Service (and other DOD security agencies) may make a computerized search of the Defense Central Index of Investigations (DCII). The DCII will reveal the subject's name and connect it to an ROI number. If the agency desires more information, it must then request the ROI in writing from the CRC.

D. Law enforcement agencies, courts, and legislatures at all levels, domestic and foreign, can receive a copy of the ROI upon written request (AR 195-2, para. 4-3d and g).

E. Private citizens, to include the news media, must make a Freedom of Information Act request. An abridged version of the ROI is provided, but the information fundamental to the titling decision is usually releasable.

F. Normally, data from the CID ROI would not be available for use by Army Selection Boards prior to an initial adjudication of guilt based on criminal justice disposition (Dep't of Army, Reg. No. 600-37, Personnel—General—Unfavorable Information, para. 5-3d (19 Dec. 1986). CID ROI information could be placed in a soldier's OMPF after a command or security referral, however. The soldier would have an opportunity for rebuttal before the final filing decision.

Clerk of Court Note

Court-Martial Processing Times

The table below shows average Army-wide court-martial processing times for the first three quarters of fiscal year 1987. For comparison, averages for fiscal year 1986 can be found in *The Army Lawyer*, Feb. 1987, at 47.

Days from dispatch of the records to their receipt by the Clerk of Court varied according to location of the sender. Records from Korea were received in an average of 11 days; those from Panama arrived in 10.5 days. Records from USAREUR were in transit an average of 9 days. Records from CONUS and Alaska took 7 days, but those from Hawaii required only 5.5 days to reach the Clerk's office.

General Courts-Martial

	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	380	364	356
Days from charges/restraint to sentence	50	51	45
Days from sentence to action	50	53	46
Days from action to dispatch	6	6	6

BCD Special Courts-Martial

	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	207	182	179
Days from charges/restraint to sentence	33	37	32
Days from sentence to action	48	45	44
Days from action to dispatch	7	6	5

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Contract Law Note

The Disputes Process—Deemed Denial Under the Contract Disputes Act

A recent note in *The Army Lawyer*[1] reviewed the opinion of the United States Court of Appeals for the Federal Circuit in *Pathman Construction Co., Inc. v. United States.*[2] The Federal Circuit stated that the "deemed denial" provision of the Contract Disputes Act of 1978[3] (CDA) permits a contractor to initiate the appeals process by filing an appeal when a contracting officer fails to render a timely response to its claim. The contractor is not, however, required to file an appeal just to protect its right to a hearing before an agency board of contract appeals or the United States Claims Court (Claims Court). This note will review the deemed denial provision of the CDA as construed by the courts and the agency boards of contract appeals.

The litigation of contract disputes is often long and cumbersome for contractors and the government. It is not unusual for the disputes process to take years. As a consequence, many contractors have been reluctant to enter into contracts with the government. In 1978, Congress passed what it hoped would formalize and speed up the disputes resolution process—the Contracts Disputes Act. This Act was designed to encourage contractors to engage in contracts with the government as well as to create an efficient system of disputes settlement.[4]

The CDA provides a contractor two avenues of appeal, to the Claims Court or the agency board of contract appeals, with the choice of either one at the contractor's election. A contractor has twelve months to appeal a contracting officer's final decision to the Claims Court, while the period is ninety days for an appeal to an agency board. The contracting officer generally has sixty days to render a final decision. Section 605(c) of the CDA provides, in pertinent part:

[1] Note, *Timeliness:* Pathman *Revisited,* The Army Lawyer, July 1987, at 51.

[2] 817 F.2d 1573 (Fed. Cir. 1987).

[3] 41 U.S.C. § 605(c) (1982 & Supp. III 1985) [hereafter CDA].

[4] S. Res. 3178, 95th Cong., 2d Sess., 124 Cong. Rec. S. 37,956 (1978). The CDA requires that a contractor be informed of certain decisions made regarding this contract.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000—

(A) issue a decision; or
(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time . . .

. . . .

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required *will be deemed to be a decision by the contracting officer denying the claim* and will authorize the commencement of the appeal or suit on the claim. (Emphasis added.)

This last "deemed denial" provision of the CDA sparked the issue of whether the statute of limitations period is triggered by the contracting officer's failure to render a decision or otherwise respond within sixty days on claims exceeding $50,000.[5]

The Claims Court addressed this issue and answered in the affirmative in *Pathman Construction Co., Inc. v. United States.*[6] In *Pathman,* a written request for a final decision that included the certification required by the CDA for claims exceeding $50,000 was submitted to the contracting officer on May 6, 1983. After several unsuccessful attempts to negotiate a settlement, the contractor, on March 11, 1985, invoked the deemed denial provision of the CDA and commenced an action in the Claims Court. That court held that the twelve-month limitation period applicable to suits on claims after adverse decisions by contracting officers was triggered by the contracting officer's failure to render a timely decision.[7] Therefore, the appeal was barred. *Pathman* was contrary to four earlier decisions of the Claims Court,[8] and to no one's surprise it was appealed to the Court of Appeals for the Federal Circuit.

While the appeal was pending at the Federal Circuit, another judge from the Claims Court disagreed with the *Pathman* decision in *Malissa Co., Inc. v. United States.*[9] *Malissa* held that the statute of limitations period on appeals was not triggered by the contracting officer's nonresponse after sixty days. The court relied on the language of the CDA and its reading of legislative intent. Writing for the court, Chief Judge Smith pointed out that a plain meaning interpretation of the CDA would be contrary to the interests of the government and the contractor. He took the view that only an actual (written) decision from the contracting officer, received by the contractor, could trigger the twelve month statute of limitations period on appeals to the Claims Court from adverse final decisions.

Pathman was thereafter reversed by the Federal Circuit.[10] The Federal Circuit held that only the receipt of an actual written decision could trigger the running of the statute of limitations period within which to appeal. The court reasoned that a "plain meaning" application would force a contractor to file suit before there was adequate time and opportunity to resolve the issues relating to the claim through negotiation. The court wrote that under its reading of the legislative history of the CDA, Congress intended that the receipt of the contracting officer's final decision be the sole event that commences the limitations period.[11]

The CDA requires that a written decision stating the reasons therefor be issued by the contracting officer, that the decision be mailed or otherwise delivered to the contractor, and that the decision inform the contractor of its appeal rights.[12] The Federal Circuit decision states that a final decision by a contracting officer conforming to the requirements of the CDA, and received by the contractor, is required to trigger the limitations period. The court compared the deemed denial situation to a defective final decision, and emphasized that the key factual similarity between the two situations was that neither gives the contractor adequate notice of its appeal rights. Therefore, neither a deemed denial nor a defective final decision will trigger the limitations period for appeal.[13]

Pathman indicates that contractors need not rush to the court house door when the contracting officer fails to respond to their claim, or in the alternative, issues a defective final decision. But are they authorized to appeal in these situations, and if so, what are the parameters of their authority? Many recent agency board of contract appeals decisions have extended the logic of both *Malissa* and the Federal Circuit decision in *Pathman* in answer to this question.

The appellate rights of contractors when they receive a defective final decision are unclear. One theory that may be argued is that the defective decision is a constructive or

[5] This note does not review the case law construing what constitutes an appealable failure to issue a decision once the contracting officer elects under § 605(c)(2) of the CDA to "notify the contractor of the time within which a decision will be issued." Section 605(c)(4), however, permits contractors to request agency boards to order the contracting officer to issue a decision: "A contractor may request the agency Board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer."

[6] 10 Cl. Ct. 142 (1986); *see* Kienlen, Pathman—*Jurisdictional Oddity,* The Army Lawyer, Nov. 1986, at 63, 64.

[7] *Pathman,* 10 Cl. Ct. at 150.

[8] *See* LaCoste v. United States, 9 Cl. Ct. 313, 315 (1986); Vemo Co. v. United States, 9 Cl. Ct. 217, 220–22 (1985); G & H Mach. Co. v. United States, 7 Cl. Ct. 199, 203 (1985); Turner Const. Co. v. United States, 9 Cl. Ct. 214, 215–16 (1985).

[9] 11 Cl. Ct. 389 (1986).

[10] *Pathman,* 817 F.2d at 1574.

[11] *Id.* at 1577–78.

[12] 41 U.S.C. § 605(c) (1982 & Supp. III 1985).

[13] *See* Bird-Johnson Co., ASBCA No. 34821 (19 June 1987). The government filed a motion to dismiss the subject appeal, contending that because more than 90 days had lapsed since the contracting officer's final decision, the board lacked jurisdiction over the appeal. The government's motion was determined to be without merit as the contracting officer did not issue a final decision in which the contractor was advised of its appellate rights. As a result, the statutory 90 day time limitation within which to appeal a final decision to the board had not run and the board had jurisdiction over the appeal. The decision did not state whether the jurisdiction of the board was based on an appeal from the defective final decision or from the deemed denial of the claim due to the facts of the case.

deemed denial under the CDA, thereby authorizing an appeal to an agency board or the Claims Court. In a recent decision, the Armed Services Board of Contract Appeals (ASBCA) held that defective final decisions can be appealed to the board. In *JGB Enterprises,*[14] the government contended that an appealable contracting officer's final decision had not been issued and moved to dismiss the appeal for lack of jurisdiction. The government argued that the contracting officer's letter did not provide all the information prescribed by 41 U.S.C. § 605(a) for a contracting officer's decision. The ASBCA held that although the final decision was defective under the CDA, it nevertheless clearly denied appellant's claim. Therefore the contracting officer's final decision letter did give appellant a proper basis for appealing to the ASBCA. The government's motion to dismiss for lack of jurisdiction was denied. The issue of whether the statute of limitations period was triggered was not addressed. According to the ASBCA, a contracting officer's final decision, even though it lacks certain statutory requirements, may, if it clearly denies the claim, authorize the contractor to appeal. The ASBCA stated that the result of a defective final decision will be held against the government, not the contractor. Specifically, while the limitations period is not triggered by the defective decision, the contractor can still seek appellate review of plain meaning decisions. The unstated corollary to this holding is that no response within sixty days to a certified claim over $50,000 will authorize the contractor to appeal.

Government contractors have also appealed from actions or determinations of contracting officers that are not perceived by the contracting officers as appealable final decisions.[15] In *Systron Donner, Inertial Division,*[16] the ASBCA held that the appearance of the words "decision" or "final decision," or the inclusion of the accepted language concerning appellate rights, was not a prerequisite for an appeal to the board. The ASBCA ruled that a final determination of Cost Accounting Standards (CAS) noncompliance was an appealable final decision, even though there was no determination of monetary impact or a monetary claim, and even though the determination of CAS noncompliance was not designated as a final decision nor in the form prescribed for a final decision.

The ASBCA decision in *Aqua-Fab, Inc.*[17] demonstrates that the CDA's deemed denial language is in fact permissive and not mandatory. In this case, the government received the contractor's certified claim on 14 October 1986. Having received no response from the government within the sixty days prescribed by 41 U.S.C. § 605(c)(2), the contractor filed a notice of appeal with the board on 4 February 1987. The contractor did not request the board to order the contracting officer to issue a final decision. The contractor's use of the deemed denial provision to start an appeal was found to be proper, and the board took jurisdiction of the appeal. The government argued that the board lacked jurisdiction due to the lack of a contracting officer's final decision. The government did not dispute the fact that it did not respond to appellant's claim, but contended that it must merely issue a contracting officer's decision within a reasonable time. The ASBCA held that upon receipt of a contractor's certified claim exceeding $50,000, the government has sixty days to either issue a contracting officer's decision or notify appellant as to when the decision will be issued. Because the government failed to respond within the sixty-day period, the appeal was properly before the board, and the government's motion to dismiss the appeal was denied.[18]

In *Dale National, Ltd.,*[19] the government moved to dismiss an appeal for lack of jurisdiction. The contractor had found a defect in the contract documents and sought clarification from the government in early May 1986 without success. The contractor then purchased additional supplies in furtherance of the contract, which formed the basis of its claim for additional costs. A series of documents pertaining to this claim passed between the parties from 29 May to 1 July 1986, when the contractor requested a final decision. The contracting officer did not respond within sixty days. On 10 November 1986, the contractor requested the ASBCA to assume jurisdiction based upon the failure of the contracting officer to issue a final decision. After the appeal was docketed, on 23 January 1987, the contracting officer issued a final decision. The ASBCA denied the government's motion to dismiss the appeal for lack of jurisdiction, stating that despite protests to the contrary, the contracting officer had adequate information to issue a final decision before the contractor filed its appeal. Once again, the government's failure to respond within sixty days was a constructive denial permitting the contractor to appeal.

In another interesting twist to the deemed denial provision, the Claims Court[20] permitted a contractor to appeal a final decision under the direct access provision of the CDA, even though the contractor had earlier asked an agency board of contract appeals to order the contracting officer to issue a final decision on the same claim. The government agency in the case, NASA, argued that the request to the board for an order constituted a binding election of the board as the forum for appeal. The Claims Court disagreed. The contracting officer neither issued a final decision on the contractor's certified claim nor notified the contractor when a decision would be rendered. The contractor sent the board two letters, both of which stated the contractor's intent to appeal the contracting officer's failure to issue a final decision. The letters did not indicate, however, whether the

[14] ASBCA No. 34379 (21 May 1987); *see* Automated Technology Management, Inc., ASBCA No. 2938, 84–2 B.C.A. (CCH) ¶ 17,484.

[15] Systron Donner, Inertial Division, ASBCA No. 31148 (21 July 1987); *see* General Electric Co., ASBCA No. 33227, 87–1 B.C.A. (CCH) ¶ 19,484; North Carolina Corp., ASBCA No. 28140, 83–2 B.C.A. (CCH) ¶ 16,801, at 83,512.

[16] ASBCA No. 31148 (21 July 1987). The board stated it had jurisdiction to decide the respective rights of the parties under a contract even though no monetary relief was sought, and that this is in accord with a consistent line of decisions. McDonnell Douglas Corp., ASBCA No. 26747, 83–1 B.C.A. (CCH) ¶ 16,377, at 81,419–22, *affirmed in part and reversed in part on other grounds sub. nom.* McDonnell Douglas Corp. v. United States, 754 F.2d 365 (Fed. Cir. 1985).

[17] ASBCA No. 34283 (20 May 1987); *see* Sierra Blanca, Inc., ASBCA No. 30943, 86–1 B.C.A. (CCH) ¶ 18,561.

[18] If the government fails to respond within 60 days, such failure is deemed a decision denying the claim and authorizes the contractor to commence an appeal.

[19] ASBCA No. 33954 (23 July 1987).

[20] W & J Constr. Corp. v. United States, 12 Cl. Ct. 507 (1987).

contractor considered the failure to issue a final decision as a denial of the claim. Moreover, the letters did not specifically invoke section 605(c)(4) of the CDA. The contracting officer then issued a final decision a few days after the board received the letters from the contractor. At the Claims Court, the contractor argued that its letters to the board did not consider the failure to issue a final decision as a denial of its claim, but instead merely asked the board to order the contracting officer to issue a final decision. The court agreed, and held that the letters were not an appeal of a deemed denial of the claim. Judge Seto explained in the decision that, according to NASA's interpretation of section 605(c)(4), every request to a board for an order would constitute a binding election to proceed before a board rather than the Claims Court, which is contrary to the purpose of the CDA. This decision, however, seems contrary to every ASBCA decision on the issue of deemed denial since the Federal Circuit's *Pathman* decision, which have treated similar letters as appeals. Perhaps yet another Federal Circuit decision is necessary to clarify the matter. The agency boards and the Claims Court must, of course, follow the Federal Circuit's decisions.

At any rate, the Federal Circuit's interpretation of the CDA's deemed denial provision and subsequent board decisions indicate that the contractor must receive a written final decision conforming to the requirements of the CDA before the limitations periods on appeals are triggered. These decisions give contractors increased bargaining power as they can, but are not required to, commence their appeals based upon receipt of a defective final decision, or if a final decision or response is not received within sixty days. The government will be held firmly to its burden, and the contracting officer must issue a proper final decision to start the running of the limitations period. Major Munns and Mr. Gregory A. Davis, Legal Intern.

Criminal Law Note

Army Rules of Professional Conduct

The Army Rules of Professional Conduct [hereinafter the Army Rules] went into effect on 1 October 1987. These rules replace the ABA Model Code of Professional Responsibility as the governing code of legal ethics for the Army. Modeled after the ABA Model Rules of Professional Conduct,[21] the Army Rules were adopted by The Judge Advocate General under the authority of the Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 109. The Army Rules apply to judge advocates, civilian lawyers employed by the Army, and civilian lawyers practicing before courts-martial.[22] These rules are the culmination of over two years of study and development aimed at the adoption of a code of legal ethics especially for Army lawyers. The Army Rules do not substantially change existing general ethical principles; however, there are some very important changes,[23] some of which are discussed below.

Army As A Client

Army Rule 1.13 addresses the age-old dilemma of what a lawyer (other than a lawyer assigned to represent an individual) should do when faced with a commander, agency head, or activity chief who acts or intends to act illegally or contrary to the Army's legal interests.[24] This situation places the lawyer in the uncomfortable position of having to decide who the client is—the Army or the commander. Identification of the client is essential in order to determine to whom the lawyer owes his or her ethical obligations.[25] Former ethical guidance on the issue was conflicting.[26] Army Rules 1.13 emphatically resolves this issue. It states that the Army is the client,[27] and it obligates the lawyer in this situation to identify the Army as the client when it is apparent that the Army's interests are adverse to those of the commander.[28] While this rule has the potential to adversely affect the relationship between the commander and his or her judge advocate, the rule also lists several measures that may be employed to minimize the impact. Among other things, the judge advocate may ask the commander to reconsider the matter[29] or may advise the commander to seek a separate legal opinion.[30] If these measures are unsuccessful or inappropriate, the judge advocate may refer the matter to or seek guidance from higher authority in The Judge Advocate General's Corps[31] and/or advise the commander to consult other counsel because of the conflict of interest.[32]

Supervisory Responsibility

Army Rule 5.1 makes supervisory lawyers responsible for the unethical conduct of subordinate lawyers under certain circumstances. A supervisory lawyer will be held responsible for the unethical conduct of another lawyer if the supervisory lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved.[33] In addition, a lawyer with direct supervisory authority over another lawyer

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[21] Army Rules of Professional Conduct Scope (1987).

[22] *Id.*

[23] *See* Burnett, *The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers,* The Army Lawyer, Feb. 1987, at 19 (This article contains an analysis of a number of the various issues raised by the adoption of the Army Rules. The author was working from a draft of the Army Rules that underwent additional changes subsequent to publication of the article.).

[24] *See* Gaydos, *The SJA as the Commander's Lawyer: A Realistic Proposal,* The Army Lawyer, Aug. 1983, at 14.

[25] Army Rules of Professional Conduct Rule 1.13 comment (1987).

[26] Gaydos, *supra note* 4, at 17–19.

[27] Army Rules of Professional Conduct Rule 1.13(a) (1987).

[28] *Id.* Rule 1.13(d).

[29] *Id.* Rule 1.13(b)(2).

[30] *Id.* Rule 1.13(b)(3).

[31] *Id.* Rule 1.13(b)(4).

[32] *Id.* Rule 1.13(b)(1).

[33] *Id.* Rule 5.1(c)(1).

will be held responsible for the unethical conduct of the other lawyer if the supervisory lawyer knows of the unethical conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[34] Rule 5.1 creates an obligation on the part of supervisory lawyers, including The Judge Advocate General, to make reasonable efforts to ensure that subordinate lawyers conform to the Army Rules.[35] Furthermore, supervisory lawyers are charged with the responsibility of ensuring that subordinate lawyers are properly trained and competent to perform the duties they are assigned.[36]

Client Perjury

Army Rule 3.3 regarding client perjury represents a major change from past practice. In the past, military defense counsel followed the approach to client perjury sanctioned in *United States v. Radford.*[37] This approach permitted the accused to take the stand and testify perjuriously if defense counsel was unable to dissuade the client from doing so, and if defense counsel was not permitted to withdraw from representation.[38] The perjured testimony could only be given in narrative form and could not be used later by defense counsel in any way (*e.g.*, in argument).[39] Under Army Rule 3.3, a lawyer faced with a client who intends to commit perjury is prohibited from offering the false testimony *in any form.*[40] In addition, if false testimony is given, the lawyer must take reasonable remedial action, including the disclosure of the perjury to the tribunal, if necessary.[41] Moreover, under Army Rule 3.3(c), a lawyer *may* refuse to offer evidence that the lawyer *reasonably believes* is false. Under this permissive provision, there is no requirement that the lawyer *know* that the evidence is false. Rather, it permits a lawyer to refuse to offer testimony or any other evidence based on the lawyer's belief that it is untrustworthy.[42]

Attorney-Client Confidentiality—Mandatory Disclosures

Under Army Rule 1.6, a lawyer *must* disclose otherwise confidential information regarding a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security, or the readiness or capability of a military unit, vessel, aircraft, or weapon system.[43] This rule is a change from the permissive disclosure rule of the Model Code,[44] which permitted, but did not require, a lawyer to disclose the intention of a client to commit a crime and the information necessary to prevent the crime.

Organization of the Army Rules

Another significant change brought about by the Army Rules is in the organization of the ethical principles. The organization is radically different from that of the Model Code. The Army Rules are organized into a series of ethical rules followed by comments. The rules state the ethical obligations of the lawyer, and the comments serve to explain and elaborate on the rules.[45] These rules are grouped into eight major subject areas and then subdivided by subject within each major area. These subdivisions are numbered, making it easy to find a certain rule within the Army Rules. Unlike the Model Code, there are no canons or ethical considerations. Major Lewis.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

1987 Legal Assistance Guides

Although it may not be obvious from the unusually small number of Legal Assistance Items appearing this month and next, the TJAGSA Legal Assistance Branch *has* been working. Within the next month, legal assistance offices should be receiving 1987 editions of several Legal Assistance Guides. Although these Guides will look different from the All States Guides to which you are accustomed, do not be alarmed. The former All States Guides have been transformed into the new, improved 1987 Legal Assistance Guides as follows:

1. The label "All States Guide" had become a misnomer because these volumes contained an increasing amount of federal law. Consequently, the "All States Guides" to Consumer Law, Marriage and Divorce, and Wills have been updated and relabelled, "Legal Assistance Consumer Law Guide," "Legal Assistance Marriage and Divorce Guide," and "Legal Assistance Wills Guide," but remain substantively unchanged. The same is true for the Legal Assistance Notarial Guide, although some 1987 editions will still bear the old "All States" label.

2. Because the "All States Garnishment Guide" has long included means of enforcing support decrees other than through garnishment, this volume has been relabelled as the

[34] *Id.* Rule 5.1(c)(2).

[35] *Id.* Rule 5.1(a).

[36] *Id.* Rule 5.1(d).

[37] 14 M.J. 322 (C.M.A. 1982).

[38] *Id.* at 326.

[39] *Id.*

[40] Army Rules of Professional Conduct Rule 3.3 comment (1987).

[41] *Id.*

[42] *Id.*

[43] Army Rules of Professional Conduct Rule 3.3(b) (1987).

[44] Model Code of Professional Responsibility DR 4–101(C)(3) (1980).

[45] Army Rules of Professional Conduct Scope (1987).

"Legal Assistance Support Enforcement Guide" but remains otherwise substantively unchanged. The Preventive Law Series, initially published in 1986, also remains unchanged except for the addition of timely materials.

3. Now for the exciting news. "Readings in Legal Assistance" and the "Legal Assistance Officer's Deskbook and Formbook" have been abolished. Both of these volumes contained materials on topics covered by numerous All States Guides, so those materials have been logically included in the related substantive volumes. In response to popular demand, materials from those books and newly-acquired materials have been grouped to form two new resources: the "Legal Assistance Office Administration Guide" and the "Legal Assistance Deployment Guide." The "Legal Assistance Office Administration Guide" contains guidance regarding professional responsibility, sample office SOPs, and other administrative materials. The "Legal Assistance Deployment Guide" includes sample instructional outlines for classes to judge advocates and troops, sample power of attorney forms designed for deployment preparation and for other purposes, suggestions on the organization of Emergency Deployment Readiness Exercises and Preparations for Overseas Movement, numerous checklists for use by deploying soldiers and their family members, and other materials.

4. Three new publications have been added: The "Legal Assistance Real Property Guide," the "Legal Assistance Soldiers' and Sailors' Civil Relief Act Guide," and the "Tax Information Series." The "Real Property Guide" contains legal guidance and forms relating to both the purchase/sale of real property and the rental of residential dwellings. The "Legal Assistance Soldiers' and Sailors' Civil Relief Act Guide" supplements Dep't of Army, Pam. No. 27–166, Soldiers' and Sailors' Civil Relief Act (Aug. 1981). The "Tax Information Series" is patterned on the "Preventive Law Series." Both contain short synopses of various aspects of law, and there is room on the cover to record the SJA's office address and phone number. These short articles can be made available to waiting-room clients, reprinted in post publications, or offered to clients with related problems in an effort to reduce attorney interview time.

5. Although the "Soldiers' and Sailors' Civil Relief Act Guide," the "Marriage and Divorce Guide," and the "Support Enforcement Guide" will be somewhat delayed in reaching legal assistance offices, the remaining eight publications should arrive shortly. As soon as these publications are mailed to legal assistance offices, we will publish a note in this column advising you what each packet will contain and when they were mailed. We will also inform you of the request number assigned to each volume by the Defense Technical Information Center so that you can obtain these materials through DTIC. Information regarding the DTIC system is located in this issue of *The Army Lawyer*, at 68.

6. We hope you find these new materials and the new format to be "user friendly." If you identify errors or have comments or suggestions regarding any of these publications, please inform us at the address listed above this note.

Missouri Passes New Law Authorizing Transfer on Death Motor Vehicle Titles

The following note is based on information submitted by Leo E. Eckhoff, COL, JA USAR (Ret.), a member of the Missouri bar.

Soldiers owning automobiles registered in Missouri should consider taking advantage of a new state law authorizing the Director of Revenue to issue certificates of ownership for motor vehicles, trailers, outboard motors, and vessels in beneficiary form. Missouri House Bill 605, 84th Gen. Assembly, amended Mo. Rev. State § 301 (1987) for motor vehicles and trailers and Mo. Rev. Stat. § 306 (1987) for outboard motors and vessels. The law became effective on September 28, 1987. Transfer on Death (TOD) registration of personal property in beneficiary form is a simple and inexpensive way to dispose of property upon death without the need for probate.

A sole owner and multiple owners who hold their interest in a motor vehicle as joint tenants or as tenants by the entirety may apply for a certificate of ownership to be issued with a transfer on death direction showing the name of one beneficiary to whom ownership of the vehicle will pass on the death of all owners. The statute limits designation to one beneficiary.

During the lifetime of the registered owners, the beneficiary has no ownership rights in the vehicle. Neither the signature nor the consent of the beneficiary is required for any transaction relating to the automobile during the lifetimes of the owners.

An owner may revoke or change a beneficiary designation by paying the fee for a new certificate of ownership. A sale of the vehicle, accompanied by a proper assignment and delivery of the certificate, also revokes the beneficiary's expectancy interest. These are the only methods by which the beneficiary designation may be revoked and the statute expressly precludes revocation by a will or a change in circumstances, such as a divorce.

The statute expressly exempts TOD beneficiary designations for titles issued by the Director of Revenue from the requirements of the Missouri statute of wills (Mo. Rev. Stat. § 47.4.320 (1987)) and from probate as a will (Mo. Rev. Stat. § 437.087 (1987)). TOD registration will be a desirable way for certain persons to hold title to automobiles and boats where they are not expected to have an estate that will be subject to probate. Soldiers may find that a TOD car title, along with a Payable on Death checking account in a financial institution, is a good way to provide for the contingency of disposing of their property, regardless of where they may be serving at the time of death. The title form also avoids the inconvenience and problems encountered when putting another person on a title as joint owner.

At death of the sole owner or last to die of joint owners, a new certificate of ownership can be obtained in the beneficiary's name by presenting proof of death of the owners named on the certificate, surrender of the certificate, and payment of the fee for a new title. Survival of the beneficiary is required and if the beneficiary does not survive, the motor vehicle will belong to the estate of the named sole owner or last to die of multiple owners.

Tax Notes

Taxpayer Denied Legal Expense Deduction Based on Value of Representing Herself

A taxpayer who represented herself in an income tax case before the Tax Court was denied a deduction for legal fees based on the value of her services. James P. Stuart, TC

Memo 1987–386. The taxpayer, who was not a lawyer, determined the amount of the deduction by adding the value of the vacation time she took in order to represent herself. In claiming the deduction, she relied on Code section 212 which allows individual taxpayers to deduct expenses incurred in the production or collection of income, or conservation of property held to produce income, or in the determination or collection of any tax. I.R.C. § 212 (West Supp. 1987).

The Tax Court, in denying the deduction, noted that otherwise allowable expense deductions must be either "paid or incurred." The word incur means "to become liable or subject to; to bring down upon oneself." The Tax Court reasoned that in representing herself, the taxpayer did not become liable to another person for expenses nor did she bring down upon herself any debt.

In the same case, the IRS conceded that taxpayers, who used the space in their condominium apartment to store documents generated in numerous lawsuits, could deduct the cost of depreciation for one-half of the space as a miscellaneous deduction. The taxpayers were unhappy with the IRS concession and claimed a larger deduction based on the fair rental value of the condominium. The Tax Court ruled, however, that the partial deduction conceded by the IRS was very generous and rejected the taxpayer's claim for the larger deduction because there was no showing that any of the lawsuits were related to the production or collection of income or for the management, consideration, or maintenance of property held for the production of income. Captain Ingold.

Taxpayer Identification Number Required for Dependents Claimed on Tax Returns

The 1986 Tax Reform Act requires taxpayers claiming any dependent who is over five years old to report the dependent's taxpayer identification number on the return. I.R.C. § 6109(e), *as added by* 1986 Act § 1524(a). This requirement applies to all returns due after December 31, 1987.

A taxpayers's failure to include a dependent's identification number on a return, or providing an incorrect identification number, will result in the imposition of a five dollar penalty. Additionally, the Internal Revenue Service can deny a deduction for a dependent if the taxpayer cannot show that it was proper to claim the deduction.

For most taxpayers, the provision will require children five years of age and older to have social security numbers by the end of the year. Taxpayers who have received an exemption from social security based on religious beliefs may obtain a taxpayer identification number directly from the Internal Revenue Service. Other individuals who are exempt from social security taxes, such as foreign students and nonresident aliens, may continue to obtain taxpayer identification numbers directly from the Service.

The provisions of the 1986 Act include adults that are claimed as dependents. Therefore, parents and unrelated adults who are claimed as dependents by a taxpayer must also have a taxpayer identification number to be claimed on the return.

To avoid long delays, military personnel should apply for social security numbers for their children from the Social Security Administration as soon as possible. Legal assistance offices should place articles in installation newspapers and command bulletins reminding soldiers of the need to apply for social security numbers for their dependents. Captain Ingold.

IRS Releases Proposed Drafts of New Tax Forms

The IRS has recently issued draft versions of three new forms developed to implement the Tax Reform Act of 1986. Pub. L. No. 99–514, 100 Stat. 2085 (1986) [hereinafter 1986 Act]. Soldiers who have purchased or rented out homes or who have made Individual Retirement Account (IRA) contributions in 1987 may have to file these new forms along with their tax returns this year.

Proposed New Form 8598, "Computation of Deductible Home Mortgage Interest," will be used to determine the amount of deductible interest on home mortgages. The 1986 Tax Reform Act retained the deduction for home mortgage interest, but placed limitations on the amount of interest that can be deducted. I.R.C. § 163(h) (West Supp. 1987). Generally, qualified home mortgage interest does not include interest on mortgage loans to the extent the debt exceeds the taxpayer's basis in the residence, plus qualified educational and medical expenses. If the debt was incurred prior to August 16, 1986, the amount of the mortgage debt on that date or the fair market value of the residence becomes the ceiling.

Not all homeowners will be required to complete Form 8598. The instructions accompanying the form state that it does not have to be filed if the only mortgage on the home was the mortgage taken out to buy the home. It also need not be filed if all of the mortgages on the home were taken out before August 17, 1986 and there was no refinancing after that date. Form 8598 must be filed, however, if the taxpayer took out a mortgage on the home after August 16, 1986 for a purpose other than to buy the home. The form must also be completed if a mortgage taken out prior to August 16, 1986 was refinanced after that date.

New Form 8598 will require taxpayers to measure the "average balance" on their mortgage debt and compare that to the basis to determine if the limitation the on qualified residence interest deduction applies. The IRS has given the taxpayers five different ways to figure the average loan balance: average balance reported by lender (average balance reporting by lender will not, however, be required until 1988); average daily balance; interest paid divided by interest rate; average of first and last balance, *e.g.*, January 1 and December 31 balances; and average of monthly balance. The four pages of instructions for Form 8598 include worksheets to calculate the average balance under each option.

Another new form some taxpayers will have to complete this year is Form 8582, "Passive Activity Loss Limitations." This form implements the 1986 Tax Reform Act change to the tax code limiting deductions from passive activities against only income from that activity or other passive activities. I.R.C. § 469 (West Supp. 1987). Passive activities include any trade or business in which the taxpayer does not "materially participate" and all rental activities. A special allowance permits taxpayers who "actively participate" in a rental activity to deduct up to $25,000 in losses from the rental activity against active income sources, *i.e.*, wages. I.R.C. § 469(c) (West Supp. 1987). The special allowance is phased out by fifty percent of the

amount that adjusted gross income exceeds $100,000 ($50,000 for single filers).

Form 8582 must be completed by all taxpayers who incurred deductible losses from passive activities, including soldiers who leased their homes or other property to third parties at a loss in 1987. Although the form is only one page long, it comes with five pages of instructions.

Taxpayers who make nondeductible contributions to their Individual Retirement Accounts (IRA) in 1987 will be required to complete Form 8606, "Nondeductible IRA Contributions, IRA Basis, and Nontaxable IRA Distributions." If a married couple both make nondeductible contributions to their IRAs, a separate Form 8606 must be filed for each spouse.

As a result of the 1986 Tax Reform Act, fewer people will be able to deduct contributions to IRAs. Taxpayers who participate in employer provided retirement plans, including active duty soldiers, are allowed to make a $2,000.00 deductible contribution only if their adjusted gross income is $25,000 or less if a single filer, or $40,000 or less if filing a joint return. I.R.C. § 219(g) (West Supp. 1987). The $2,000.00 deduction is phased out over a $10,000 range if incomes exceed these levels. The 1986 Act nevertheless permits taxpayers to make nondeductible contributions to the extent that deductible IRA contributions cannot be made. The tax on these earnings will continue to be deferred until withdrawal and the portion of the IRA stemming from nondeductible contributions is not subject to tax upon withdrawal.

New Form 8606 should be used to report all nondeductible IRA contributions. The form should also be used to figure the basis, or that part of the IRA that will not be taxable upon withdrawal. The directions for completing the form state that a copy of the form should be retained by the taxpayer until all funds are withdrawn from the IRA. Captain Ingold.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Claims Cognizable as Personnel Claims That Involve Personal Injury

The prompt payment of personnel claims is essential to maintain morale. In keeping with the spirit of 31 U.S.C. § 3721, many field claims offices are quick to respond when a soldier suffers a catastrophic loss, and rightfully so. Occasionally, however, prompt payment on a superficially meritorious personnel claim creates difficulties when a claim is later filed for personal injury arising out of the same incident. Paragraph 11–2*d*(2), AR 27–20 (10 July 1987) states:

> If a claim cognizable under this chapter [AR 27–20, chap. 11] arises from an incident resulting in personal injury, no payment or emergency partial payment will be made under this chapter until an investigation completed in accordance with paragraphs 2–7 and 2–8 has been conducted. The Commander, USARCS, or designee, or the chief of a command claims service may waive this requirement. Prior to payment, the investigation must establish that the incident was not caused by the negligence of the claimant or an agent of the claimant. An example of such an incident would be a fire in quarters which results in an injury to a soldier's family member and was presumably caused by faulty wiring, but might have been caused by the claimant's negligence.

When an incident such as a fire in quarters results in personal injury cognizable under the Military Claims Act or the Federal Tort Claims Act as well as damage to personal property, it is essential for field claims personnel to obtain all the information available and to contact either the General Claims Division, USARCS, or a command claims service prior to any payment.

Repair Estimates Provided by Carriers

Increased Carrier Released Valuation has changed the way many carriers are handling claims for damage incurred in shipment, and a number of carriers have advised USARCS that they intend to have local repair firms inspect property and provide an estimate of repair to the local field claims office. They have advised this Service that some field claims offices have refused to accept such estimates, however.

A repair estimate from a firm selected by the carrier is used if that firm can and will do the repairs adequately for the lowest overall cost. Any such estimate may be rejected, of course, if the firm is incapable of doing the necessary repairs or has a reputation for doing inadequate work. The mere fact that the estimate was provided by a firm selected by the carrier is not by itself a basis for rejection.

Repair estimates received from a carrier prior to receipt of a claim should be filed in the claims office with DD Forms 1840R. Whenever the lowest repair estimate overall is not used, the claims file must reflect the basis for this.

Unnecessary Paperwork

A recent change in personnel claims policy, Claims Office Administration Bulletin 3, emphasizes eliminating unnecessary paperwork burdens on claimants. The Bulletin, distributed as part of change 5 to the U.S. Army Claims Service Claims Manual, has an effective date of 10 August 1987 to coincide with the UPDATE revision of AR 27–20. It directs field claims offices to require a claimant to provide only *one* copy of the basic claims forms, DD Forms 1842 and 1844, and of supporting documents. The claims office will photocopy additional copies.

The change is expected to ease the burden of filing a claim and to reduce the size of claims files. The U.S. Army

Claims Service will shortly begin storing claim files on microfilm, using micrographics equipment, instead of storing the actual paper file. Files will be recopied onto paper if requested from storage. This change will save money and reduce the time needed to respond to requests.

Instructions to claimants that direct submission of more than one copy of forms and other documents should be revised immediately, and claims offices are reminded that there is no requirement that they provide duplicate original claims forms to the finance office paying the claim.

Tort Claims Note

Recent FTCA Denials

1. Electrical burns. Claimant was injured when he lifted an uninsulated electrical line 2½ feet above his boat deck while he was sailing in a Corps of Engineers reservoir where the water was at flood state, 26 feet above normal level. Because the danger was open and obvious, the claim was denied under the Oklahoma Recreational Use Statute (Okla. Stat. tit. 2, § 1301–15) and the flood and flood waters exclusion (33 U.S.C. § 702(c)).

2. Wrong Federal Agency. On 8 December 1984, claimant was injured while working as an employee of an independent contractor on the portion of the Corpus Christi (Texas) Naval Depot leased to the Army. The Navy was the proper agency to receive the claim. On 17 October 1985, an administrative claim was filed against the Navy. On 9 October 1986, he and his wife filed suit. On 4 December 1986, he, his wife, and their three children filed administrative claims against the Army. The husband's claim against the Army is a nullity as he is already in suit. The wife's claim was filed with the wrong agency and does not toll the statute of limitations. Because she did not file an administrative claim with the proper agency prior to filing suit, it will be argued that there is no jurisdiction for the court to consider her suit. The same is true as to the children's claims.

3. Vandalism. Claimant, a retiree, had his car damaged by an unknown person when suspected battery acid was poured on it while he was shopping at an Army commissary. The claim was denied as the U.S. is not responsible for acts of vandalism by unknown persons on a military installation. The claim is not payable under chapter 11 as the claimant is a retiree.

4. Rental of Substitute Vehicle. A claim for damages to a POV resulting from a collision with a GOV was paid in full without requiring a DA Form 1666 which is not required in absence of personal injuries. Subsequently, the same claimant filed a claim for the rental of a substitute vehicle. There is no authority to reconsider or reopen the first claim as only one payment can be paid under chapters 3 through 6, AR 27–20. Attention is directed to the language contained on SF 95 to that effect.

5. Car Struck by Golf Ball. Claimant's car was struck by a golf ball while it was parked on the edge of the golf course across the street from his on-post quarters. The claim was denied. There was a safe parking spot provided for the quarters a short distance away.

6. Fall on Uneven Sidewalk. Claimant was injured when she tripped on a sidewalk due to a variance of ¾ of an inch where two sections joined together. The sidewalk was in good condition. The claim was denied as such variations are normal and clearly visible.

Claims Manual Change 6

In mid-August, USARCS mailed copies of change 6 to the Claims Manual to all Claims Manual holders of record. The following specific changes are contained in change 6:

Chapter 2, Household Goods Recovery, Bulletin 8 is added.

Chapter 4, Torts—United States, Appendix A, Addendum of updated cases is added to Federal Tort Claims Handbook.

Annexes section, Annexes A and B replace Annexes A, B, and C. A list of area claims offices is contained in Annex A.

For a listing of the general contents of all previous changes, see *The Army Lawyer*, Aug. 1987, at 67 (change 5) and *The Army Lawyer*, June 1987, at 49 (changes 1 through 4).

Administrative Law Note

Administrative Law Division, OTJAG

Retired Pay for Soldiers Reduced in Grade as a Result of Unsatisfactory Performance or Disciplinary Action

The Tower Amendment (10 U.S.C. § 1401a(f) (1982)) was adopted in 1975 in order to prevent retired pay inversions. For several years prior to 1975, upward cost-of-living adjustments of retired pay had occurred in greater amounts and at greater frequency than increases in active duty military basic pay. Therefore, many of those who remained on active duty after becoming eligible for retirement were losing considerable amounts in retired pay. The Tower Amendment provided an alternate method of calculating retired pay: the maximum amount of retired pay is based not on the member's actual retirement, but rather on the earlier eligibility for retirement. Thus, a soldier who voluntarily retires based on longevity of service is entitled to the maximum amount of retired pay to which he or she would have been entitled had the soldier retired at some time prior to the actual retirement date. Computation of such retired pay is based upon the soldier's grade, length of service, and the rate of basic pay applicable at the earlier time.

In a recent decision (B–225150, May 4, 1987), the Comptroller General concluded that the Tower Amendment applies even to soldiers who are reduced in grade pursuant to a court-martial sentence. In effect, even though soldiers are retired in their reduced grade, their retired pay is to be computed based upon the grade in which they would have been entitled to retire at an earlier date. The specific facts involved the court-martial of an Air Force technical sergeant (E–6) who had served on active duty in excess of twenty years. He was sentenced to be reduced in grade to airman (E–1) and to be placed in confinement. Upon release from confinement, he was permitted to retire in the grade of airman. Because of the application of the Tower Amendment, his retired pay is based upon his rank of technical sergeant.

This decision is consistent with an earlier ruling by the Comptroller General where it was held that the Tower Amendment applies notwithstanding that a member retired at a lower grade due to unsatisfactory performance or disciplinary action (*see* 56 Comp. Gen. 740 (1977)). The Comptroller General reached these conclusions by relying on the ordinary and usual meaning of the words and phrases of the Tower Amendment and found no different purpose clearly manifested in the statute or its legislative history. As such, the Comptroller General had no alternative but to conclude that it applies. In so doing, however, he noted that the services may find it desirable to seek legislative change.

The services are currently considering amendatory legislation. In the meantime, judge advocates need to be aware of the effects of the Tower Amendment and advise their clients accordingly.

Automation Notes

Information Management Office, OTJAG

JAGC Defense Data Network Directory

The following updates and replaces the initial JAGC Defense Data Network (DDN) Directory that was published in *The Army Lawyer*, May 1987, at 65. It is current as of 4 September 1987, but because addresses change frequently, it may not be exhaustive. Please send your corrections or additions to this information to: Office of The Judge Advocate General, Headquarters, Department of the Army, ATTN: DAJA–IM, The Pentagon, Washington, D.C. 20310–2216.

Instructions on how to use E-mail can be obtained from your local DDN host computer management office. Normally, mail sent through the DDN is addressed in the following manner: To: mailer! < drothlisb@optimis-pent.arpa > Procedures have changed since May when we indicated that only the username was required when sending mail to an addressee whose mailbox was on the sender's host computer. Now the entire name must be used; there is only one procedure for all addressees.

E-mail means easy, quick, personal communication across the time zones. For anyone in Korea or Germany who has risen at the crack of dawn to wheedle with an overseas operator for a line and then gotten a busy signal or "She's out of the office today," E-mail can also be very satisfying.

Office of The Judge Advocate General

Office of The Judge Advocate General
HQDA, The Pentagon
Washington, D.C. 20310–2200

Office DDN Address: DROTHLISB@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS DDN host computer. E-mail to them should be addressed in the following manner:

MAILER! < USERNAME@OPTIMIS–PENT.ARPA >

Owner	*Username*
BAKER, MS BARBARA	BBAKER
BLACK, MAJ SCOTT	BLACK
CANERDAY, CPT JON	CANERDAY
CARLSON, MAJ LOUIS	LCARLSON
CARRIER, CPT DAVID	CARRIER
CHADA, MS GINGER	DAJA_IA
CONTENTO, CPT DENISE	DAJA_AL1
DELORIO, MAJ DOMINICK	DELORIO
EGOZCUE, CW3 JOSEPH	EGOZCUE
FAGGIOLI, MAJ VINCENT	FAGGIOLI
GRAY, MS JACKIE	GRAY
HOLDEN, MAJ PHILIP	HOLDEN
ISAACSON, MAJ SCOTT	ISAACSON
KEARNS, MS THELMA	KEARNS
MACKEY, LTC PATRICK	PMACKEY
MANUELE, MAJ GARY	GMANUELE
MARCHAND, LTC MICHAEL	MARCHAND
MCFETRIDGE, MAJ ROBERT	MCFETRIDG
MURDOCH, CPT JULIE	MURDOCH
POPESCU, MAJ JOHN	POPESCU
PYRZ, MAJ THOMAS	PYRZ
ROTHLISBERGER, LTC D	DROTHLISB
RUSSELL, MAJ J S	JSRUSSELL
SCHWARZ, MAJ PAUL	SCHWARZ
SCHNIEDER, MAJ M	DAJA_AL
STAMETS, MR ERIC	STAMETS
WAGNER, CPT CARL	DAJA_ALP1
WALTERS, MS KATHEY	WALTERS
WHITE, MAJ RONALD	RWHITE
WOODLING, MAJ DALE	WOODLING

U.S. Army Legal Services Agency

U.S. Army Legal Services Agency
Nassif Building
5611 Columbia Pike
Falls Church, VA 22041–5013

Office DDN Address: BRUNSON@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
BRANSTETTER, MAJ ROS	BRANSTETTER
BRIDGES, MS DOROTHY	DBRIDGES
BRUNSON, MAJ GIL	BRUNSON
CROW, MAJ PATRICK	CROW
FULTON, MR WILLIAMS	FULTON
HARDERS, MAJ ROBERT	HARDERS
KAPANKE, MAJ CARL	KAPANKE
KIENLEN, MR RONALD	JALS_CA1

KINBERG, MAJ EDWARD	KINBERG
LYNCH, MAJ JAMES	JALS_CA2
MCCARTY, MS BEVERLY	MCCARTY
MIEXELL, LTC JOHN	JALS_TCA
ROLLINS, MR JOHN	ROLLINS
SILVA, MS NANCY	SILVA
STOKES, CPT WILLIAM	WSTOKES

The Judge Advocate General's School

The Judge Advocate General's School
Charlottesville, VA 22903–1781

Office DDN address: DODSON@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
BILLINGSLEY, SFC GLENN	BILLINGS
BUNTON, SFC LARRY	BUNTON
CAYCE, CPT LYLE	CAYCE
DODSON, CPT DENNIS	DODSON
GETZ, CPT DAVID	GETZ
HAYNES, MAJ TOMMY	JAGS_SSA1
JEPPERSON, MAJ JON	JAGS_DDC1
OLDAKER, MS HAZEL	OLDAKER
SCHOFFMAN, MAJ ROBERT	SCHOFFMAN
WOODRUFF, MAJ WILLIAM	WOODRUFF
ZUCKER, LTC DAVID	ZUCKER

U.S. Army Claims Service

U.S. Army Claims Service
Building 4411
Fort Meade, MD 20755

Office DDN Address: JACS_IMO1@OPTIMIS–PENT.ARPA

Owner	*Username*
WESTERBEKE, MR G.	JACS_IMO1

U.S. Army Recruiting Command

Command Legal Counsel, Bldg. 48A
U.S. Army Recruiting Command
Fort Sheridan, IL 60037–6000

Office DDN Address: USAREC@DDN2.ARPA

U.S. Army Strategic Defense Command

U.S. Army Strategic Defense Command
P.O. Box 1500
Huntsville, AL 35807–3801

Office DDN Address: JONESJ@OPTIMIS–PENT.ARPA

U.S. Army Strategic Defense COMMAND2
1941 Jefferson Davis Highway
P.O. Box 15280
Arlington, VA 22215–0150

Office DDN Address: DGRAY@OPTIMIS–PENT.ARPA

U.S. Army Training & Doctrine Command

Office of the Staff Judge Advocate
HQ, USA Signal Center & Fort Gordon
Fort Gordon, GA 30905–5280

Office DDN Address: MLANOUE@OPTIMIS–PENT.ARPA

Office of the Staff Judge Advocate
HQ, US Army Air Defense Artillery Center & Fort Bliss
Fort Bliss, TX 79916–5000

Office DDN Address: HOLMES@OPTIMIS–PENT.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
TUDOR, CPT RONNIE B.	TUDOR
HOLMES, MSG RAY	HOLMES

U.S. Army Forces Command

Staff Judge Advocate
HQ, 7th Infantry Division & Fort Ord
ATTN: AFZW–JA
Fort Ord, CA 93941

Office DDN Address: BOULANGER@OPTIMIS–PENT.ARPA

Staff Judge Advocate
U.S. Army Garrison
Fort Devens, MA 01433–5050

Office DDN Address: AFZD_JAO@OPTIMIS–PENT. ARPA

U.S. Army Europe & Seventh Army

Office of the Judge Advocate
U.S. Army Europe & Seventh Army
APO New York 09403–0109

Office DDN Address: JA@USAREUR–EM.ARPA

Owner	*Username*
BROWN, MS VIRGINIA	BROWNV
WELSH, CW2 MICHAEL	WELSHM

U.S. Army Japan

Office of the Staff Judge Advocate
HQ, USA, Japan
Camp Zama Japan
APO SF 96343

Office DDN Address: AJJA@ZAMA–EMH.ARPA

Office of the Staff Judge Advocate
10th Area Support Group
Torrii Station, Okinawa, Japan
APO SF 96331–0008

Office DDN Address: AJGO–SJA@BUCKNER–EMH.ARPA

U.S. Army Korea & Eighth Army

Office of the Judge Advocate
HQ, Eighth U.S. Army
APO SF 96301

Office DDN Address: USFK–JAJ@WALKER–EMH.ARPA

Office of the Staff Judge Advocate
HQ, 19th Support Command
APO SF 96212

Office DDN Address: HQ19–SJA@WALKER–EMH.ARPA

Office of the Staff Judge Advocate
HQ, 2d Infantry Division
APO SF 96224

Office DDN Address: JAJ–2@WALKER–EMH.ARPA

U.S. Army Material Command

Commander
Anniston Army Depot
Legal and Claims Office
Anniston, AL 36201–5005

Office DDN Address: 1MASON@ANAD.ARPA

Office of the Staff Judge Advocate
HQ, U.S. Army Aviation Systems Command
4300 Goodfellow Blvd.
St. Louis, MO 63120–1798

Office DDN Address: AMSAVJL@AVSCOM.ARPA
Individual DDN Addresses: The following individuals have addresses on the OPTIMIS host computer:

Owner	*Username*
COL ROGER G. DARLEY	RDARLEY@ AVSCOM.ARPA

Commander
U.S. Army Dugway Proving Ground
ATTN: STEDP–JA
Dugway, UT 84022–5000

Office DDN Address: STANGLER@DPG-1.ARPA

Office of the Chief Counsel/SJA
HQ, U.S. Army Test & Evaluation Command
ATTN: AMSTE-JA
Aberdeen Proving Ground, MD 21005-5055

Office DDN Address: AMSTELO@APG-4.ARPA

Office of the Command Judge Advocate
U.S. Army Yuma Proving Ground
ATTN: STEYP-JA
Yuma, AR 85365-9102

Office DDN Address: YPGJAG@YUMA.ARPA

U.S. Army Military Traffic Management Command

Staff Judge Advocate
HQ, Western Area, MTMC
Oakland Army Base
Oakland, CA 94626-5000

Office DDN Address: AABWRM@NARDACVA.ARPA

Looking Even Better With the ALPS P2000G and Enable

Some PC users have experienced problems trying to use the ALPS P2000G printer in Near Letter Quality (NLQ) mode with the Enable software package. Even though they select NLQ print mode on the front control panel, the printer reverts to Draft mode and refuses to print in anything else.

This happens because Enable Version 1.15 has an option in the Printer Profile section that allows you to "verify" the "printer connection." In theory, it is not such a bad idea to check and ensure that there is a printer "out there." In practice, the codes that Enable sends to the printer to do the checking override the commands entered through the ALPS P2000G's front control panel, resulting in Draft mode.

To fix this problem:

1. Start from the Enable Main Menu.
2. Select MCM from the top line.
3. Select PROFILE from the next line.
4. Select REVISE.
5. Hit any key.
6. Type in the name of the Profile you use.
7. Hit the Return Key.
8. Select #1, Hardware.
9. Hit the Return Key twice.
10. Change the "Should printer connection be verified?" answer from YES to NO.
11. Hit the F10 Key and select SAVE.
12. Hit the F10 Key again and select QUIT, then YES.
13. You should now be back at the Enable Main Menu; select Return To DOS.
14. Restart Enable.

You should now be able to use the NLQ mode with your ALPS P2000G.

NOTE TO EXPERTS: When printing word processing documents, Enable's Printer Code "M" is probably the best choice. Graphics, however, seem to come out better using Printer Code "O." But wait, you say, the list of codes only goes up to "K." Trust me, if you have loaded Printer Codes "M" and "O" onto your hard disk from the Enable "Install" diskette, you can use them in your Profile, even if they do not appear on the list. Remember, you cannot use a Printer Code that you have not already loaded onto the hard disk from the Enable "Install" diskette, even though the desired code's name appears in the Profile Definition section. Captain David L. Carrier, Software Development Officer.

Bicentennial of the Constitution

Bicentennial Update: November 1787; The Anti-Federalist Argument

This is one of a series of articles tracing the important events that led to the adoption and ratification of the Constitution. Prior Bicentennial Updates appeared in the January and April through September 1987 issues of The Army Lawyer.

As the state conventions were considering the Constitution, the anti-federalists had their first opportunity to influence the public debate. They bombarded the public with newspaper articles, mass meetings, and pamphlets attacking the proposed national government. Using pen names such as "Cato," "Philadelphiensis," and "Letters of Agrippa," the anti-federalists took issue with James Madison, Alexander Hamilton, and John Jay, the authors of the Federalist Papers.

The anti-federalists were generally older people who held strong beliefs in the basic ideas of republicanism. They felt that a republic should place the greatest power in a legislature composed of representatives elected locally, by the people in a community. The anti-federalists thought that this form of representative government could only work in a small community of citizens with similar ideals and beliefs, because only there would it be possible for people to form a consensus about what was in their common welfare. In addition, the anti-federalists believed that it was easier in a small community for individuals to set aside their personal interests to promote the common good. The anti-federalists saw in the Constitution the potential for exactly the opposite of their ideal: a strong central government far removed from the wishes of the people. Their arguments made the following points:

—The Constitution gave too much power to the national government at the expense of the states.

—The Executive Branch would have too much power at the expense of the other branches.

—The "necessary and proper" clause gave Congress too much power over state governments.

—The Constitution did not adequately separate the powers of the executive and legislative branches.

—The national government had the authority to maintain a standing army during peacetime.

—The Constitution had no bill of rights.

—The meetings of the Constitutional Convention should have been open to the public.

Many distinguished figures were anti-federalists, including some of the delegates to the Constitutional Convention. Governor George Clinton of New York fired one of their early salvos. On October 25, 1787, writing as "Cato," he warned that the proposed national government would comprise "interests opposite and dissimilar" to those of the States and that it would "emphatically be like a house divided against itself." "Cincinnatus I" (who was probably Richard Henry Lee) followed on November 1 with a prediction that the Constitution would "sacrifice the liberties of the people to the power and domination of a few." On November 3, Elbridge Gerry of Massachusetts, one of the three delegates to the Constitutional Convention who had refused to sign it, published his objections. The next day, the *New York Journal and Weekly Register* published a letter from "A Son of Liberty" excoriating the Constitution. According to "Liberty," the new government give the country high taxes, an army for "supporting tyrants" and "greedy officers . . . who will fatten on the spoils of the people." Later, the *New York World* printed the "Cato IV" article, which attacked the offices of the President and Vice-President in the Constitution.

Other prominent anti-federalists included Patrick Henry, Luther Martin, Robert Yates, George Mason (another Convention delegate who refused to sign the Constitution), and Mercy Otis Warren, one of the few women active in politics at the time.

As the debate heightened, the States continued to prepare for their ratifying conventions. Pennsylvania had been the first to call for its ratifying convention, on September 29. Connecticut, Massachusetts, and New Jersey had followed in October. On November 6, Pennsylvania elected delegates to its ratifying convention (Abraham Lincoln, a distant relative of the future President, represented Berks County at the Pennsylvania Convention; he opposed the Constitution). On November 10, the Delaware legislature called for its ratifying convention to be held on December 3; delegate elections took place on November 26. Connecticut elected its delegates on November 12, and the Pennsylvania convention began meeting in Philadelphia on November 20. Finally, on November 27, Maryland called for its state ratifying convention to convene on April 21, 1788. (Future Bicentennial Updates will follow the ratification of the Constitution during 1787 and 1788).

Designated Bicentennial Defense Communities

Thirty-seven Army activities are now Designated Bicentennial Defense Communities. The list includes:

United States Communities: Fort Belvoir, Virginia; Fort Benning, Georgia; Fort Bragg, North Carolina; Fort Campbell, Kentucky; Fort Devens, Massachusetts; Fort Dix, New Jersey; Fort Drum, New York; Fort Eustis, Virginia; Fort Gillem, Forest Park, Georgia; Fort Gordon, Georgia; Cold Regions Research & Engineering Laboratory, Hanover, New Hampshire; Fort Benjamin Harrison, Indiana; TRADOC Combined Arms Test Activity, Fort Hood, Texas; III Corps and Fort Hood, Texas; Fort Sam Houston, Texas; Fort Huachuca, Arizona; Fort Jackson, South Carolina; The Judge Advocate General's School, Charlottesville, Virginia; Camp Lincoln, Springfield, Illinois; Fort Meade, Maryland; Military Ocean Terminal, Bayonne, New Jersey; U.S. Army Support Command, Fort Shafter, Hawaii; Fort Sheridan, Illinois; Fort Sill, Oklahoma; Fort Stewart, Georgia; Vint Hill Farms Station, Warrenton, Virginia; Waterways Experiment Station, Vicksburg, Mississippi; and the United States Military Academy, West Point, New York.

Federal Republic of Germany: Baumholder Military Community; Darmstadt Military Community; Garmisch Military Community; Karlsruhe Military Community; Swaebisch Gmuend Military Community; 1st Personnel Command (Kilbourne Kaserne); and 8th Infantry Division.

Italy: Livorno Military Community.

Republic of Korea: Yongsan and Area III.

Let us know if your installation has become a Designated Bicentennial Defense Community and is not yet on our list. Information about applying to become a Bicentennial Community appears in *The Army Lawyer*, May 1987, at 69.

Bicentennial Celebrations

XVIIIth Airborne Corps, Fort Bragg, and the 1st Personnel Command (Kilbourne Kaserne, Federal Republic of Germany) have written us about their Bicentennial activities. Fort Bragg has an active program the includes lectures by the Honorable James G. Exum, Jr., the Chief Justice of the North Carolina Supreme Court, and the Honorable Robinson O. Everett, Chief Judge of the United States Court of Military Appeals; a book display at the main post library; a dramatic performance, "Black Defenders of the Constitution: Colonial Times to the Present," sponsored by the Federal Women's Program; a Constitution Display in the Corps Headquarters; a series of articles in the post newspaper, *Paraglide*; and "Bicentennial Minutes" on Dragon Eye TV. In addition, the Corps sponsored a mock constitutional convention in a local school, and, at the Fayetteville Dogwood Festival, members of the Golden Knights parachute team jumped and presented a copy of the Constitution to Congressman Charlie Rose.

1st Personnel Command has been publishing Bicentennial Bulletin Briefs in their weekly bulletin. They also performed a historical reenactment of the signing of the Constitution at a luncheon on September 17, and prepared a ten-minute interview on the Constitution for broadcast on the Armed Forces Network-Europe during the evening of September 16.

This column is designed to share ideas for celebrating the Constitution. If your installation has noteworthy Bicentennial programs, tell us about them.

Bicentennial Resource Packets

TJAGSA still has a limited number of the Bicentennial Resource Packets announced in *The Army Lawyer*, Dec. 1986, at 66. To obtain a copy (or to report Bicentennial activities) write to The Judge Advocate General's School, ATTN: JAGS–DDL, Charlottesville, Virginia 22903–1781.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1988 Academic Year On-Site Schedule

The following information updates the 1988 academic year Continuing Legal Education (On-Site) Training Schedule published in the July 87 edition of *The Army Lawyer*, at 67.

1. The Minneapolis on-site POC is MAJ Cindy Kaywell, 1135 U.S.P.O. and Customs House, St. Paul, Minnesota 55101, (632) 725–7241.

2. The New Orleans training site is the Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, Louisiana 70130, (504) 525–2500. The POC action officer is changed to CW3 William P. Schulz, Office of the AG, AGO Building, ATTN: LANG–SJA, Jackson Barracks, New Orleans, LA 70146–0330, (504) 278–6228.

3. The host unit for the Chicago on-site is the 7th MLC. The POC action officer is Major Robert Phillips, 7th MLC, 880 Carol, Woodstock, Illinois 60098, (815) 338–4511.

4. The training site for the Park City, Utah on-site is the Olympic Hotel, Park City, Utah.

5. The training site for the Washington, D. C. on-site is Humphrey's Hall, Fort Belvoir, Virginia.

6. The action officer for the Miami on-site is Major John Copelan, Miami Deputy City Attorney, 1100 AmeriFirst Building, 1 South East 3rd Avenue, Miami, Florida 33131.

7. The action officer for the San Francisco on-site has been changed to LTC David L. Schreck, 50 Westwood Drive, Kentfield, California 94904, (415) 557–3030.

8. The date of the Los Angeles on-site has been changed to 30–31 January 1988.

Early Application Gets the Course

The Army National Guard receives a limited number of course quotas for courses taught at TJAGSA.

Most course allocations are filled by National Guard judge advocates four to six months before the course actually begins. We recognize that the normal unit training year for the Army National Guard is scheduled in October for the upcoming year. Because training dollars and man days are limited, every individual who desires to go to a resident course of instruction should apply at the earliest opportunity.

Attorneys are unique in that court calendars, witness appearances, and extended trial schedules are not controlled by any one set of "players," but earlier planning of military training schedules will make it a great deal easier to cope with those "difficult to control factors." Judge advocates should also be ready to call to the attention of the commander who feels that everyone else should go to resident courses before the JAG, that JAG qualifications are just as reflective upon the command as the other more visible personnel, and that these qualifications are difficult to obtain and to maintain.

Questions concerning course allocations and attendance should be referred to LTC Robert Doane, National Guard Advisor to The Judge Advocate General's School, ATTN: JAGS–GRA, Charlottesville, VA 22903–1781 or phone (800) 654–5914 ext. 384, or (804) 972–6384.

Individual Ready Reserve Screen

All judge advocate members of the Individual Ready Reserve (IRR) are reminded of the mandatory obligation to report to the nearest recruiting station during their birth month for their annual IRR screen. The IRR screen serves as a valuable source of information for the Army on IRR members. The fact that the IRR constitutes fifteen percent of the Army's total manpower heightens the Army's need to have more accurate records on the IRR. Should mobilization occur, it will be imperative to have accurate records of the status and location of IRR members in order to bring the Army to its full strength on short notice.

Attendance at the IRR screen is mandatory unless the member: is within 120 days of ending his or her service obligation; lives overseas; or lives more than 100 miles from the nearest recruiting station. Failure to attend the mandatory screen—unless the member falls within one of the above exceptions—could result in adverse administrative o punitive action. IRR members attending the IRR scree will be issued a day's pay for their duty. Each JA membe of the IRR should have received official notification of th IRR screen within the past year; however, if this has n happened, the following toll free number should be calle for more information: (800) 654–3745. Reservists in Alasl and Missouri can call collect (314) 263–7230.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

November 2-6: 91st Senior Officers Legal Orientation Course (5F-F1).

November 16-20: 37th Law of War Workshop (5F-F42).

November 16-20: 21st Legal Assistance Course (5F-F23).

November 30-December 4: 25th Fiscal Law Course (5F-F12).

December 7-11: 3d Judge Advocate and Military Operations Seminar (5F-F47).

December 14-18: 32d Federal Labor Relations Course (5F-F22).

1988

January 11-15: 1988 Government Contract Law Symposium (5F-F11).

January 19-March 25: 115th Basic Course (5-27-C20).

January 25-29: 92nd Senior Officers Legal Orientation Course (5F-F1).

February 1-5: 1st Program Managers' Attorneys Course (5F-F19).

February 8-12: 20th Criminal Trial Advocacy Course (5F-F32).

February 16-19: 2nd Alternate Dispute Resolution Course (5F-F25).

February 22-March 4: 114th Contract Attorneys Course (5F-F10).

March 7-11: 12th Administrative Law for Military Installations Course (5F-F24).

March 14-18: 38th Law of War Workshop (5F-F42).

March 21-25: 22nd Legal Assistance Course (5F-F23).

March 28-April 1: 93rd Senior Officers Legal Orientation Course (5F-F1).

April 4-8: 3rd Advanced Acquisition Course (5F-F17).

April 12-15: JA Reserve Component Workshop.

April 18-22: Law for Legal Noncomissioned Officers (512-71D/20/30).

April 18-22: 26th Fiscal Law Course (5F-F12).

April 25-29: 4th SJA Spouses' Course.

April 25-29: 18th Staff Judge Advocate Course (5F-F52).

May 2-13: 115th Contract Attorneys Course (5F-F10).

May 16-20: 33rd Federal Labor Relations Course (5F-F22).

May 23-27: 1st Advanced Installation Contracting Course (5F-F18).

May 23-June 10: 31st Military Judge Course (5F-F33).

June 6-10: 94th Senior Offices Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Legal Administrators Workshop (512-71D/71E/40/50).

July 18-29: 116th Contract Attorneys Course (5F-F10).

July 18-22: 17th Law Office Management Course (7A-713A).

July 25-September 30: 116th Basic Course (5-27-C20).

August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).

August 1-May 20, 1989: 37th Graduate Course (5-27-C22).

August 15-19: 12th Criminal Law New Developments Course (5F-F35).

September 12-16: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	on or before 30 July annually
Florida	assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	1 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually

Wisconsin	1 March annually
Wyoming	31 December in even or odd years depending on admission

For addresses and detailed information, see the July 1987 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

January 1988

1–11: NITA, Gulf Coast Regional Trial Advocacy Program, New Orleans, LA.

3–8: NITA, Advanced Trial Advocacy, Berkeley, CA.

3–9: NITA, Midwest Regional Trial Advocacy Program, Chicago, IL.

11–15: UMLC, Philip E. Heckerling Institute on Estate Planning, Miami Beach, FL.

13: PBI, Appellate Advocacy and Procedure (Video), State College, PA.

14–15: PLI, Securitization of Commercial Real Estate, New York, NY.

14–15: PLI, Advanced Antitrust: Mergers and Acquisitions, San Francisco, CA.

14–15: PLI, Impact of Environmental Regulations on Business, Chicago, IL.

14–16: ABA, Appellate Advocacy, San Diego, CA.

15: LSU, Recent Developments in Legislation and Jurisprudence, Monroe, LA.

18–21: USCLC, Institute on Federal Taxation, Los Angeles, CA.

20: PBI, Pennsylvania Corporate Taxes (Video), Kittaning, PA.

21–22: ABA, Distribution of Products III, Orlando, FL.

21–22: PLI, Distribution and Marketing, New York, NY.

22: PBI, Representing Residential Landlords and Tenants (Video), Ridgway, PA.

28: PBI, Trial Evidence (Video), State College, PA.

28–29: PLI, ERISA and Bankruptcy, New York, NY.

28–29: PLI, Impact of Environmental Regulations on Business, San Francisco, CA.

31–2/4: NCDA, Trial Advocacy, Colorado Springs, CO.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1987 issue of *The Army Lawyer.*

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. New this month are the 1987 All States Law Summaries.

Contract Law

AD A181445	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509	All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).

AD B100236 Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233 Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252 All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD A174549 All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092 All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B114052 All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B114053 All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054 All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988 Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989 Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857 Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).
AD B110134 Preventive Law Series/JAGS–ADA–87–4 (196 pgs).

Claims

AD B108054 Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849 AR 15–6 Investigations: Programmed Instruction/ JAGS–ADA–86–4 (40 pgs).
AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251 Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016 Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990 Reports of Survey and Line of Duty Determination/ JAGS–ADA–87–3 (110 pgs).
AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations/ JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204 Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs).

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 37–100–88/89	Army Management Structure, Vol. I and II		Jul 87
AR 690–950	Career Management		31 Jul 87
AR 700–131	Loan and Lease of Army Material		4 Sep 87
Cir 1–87–1	1987 Contemporary Military Reading List		1 Aug 87
DA Pam 25–30	Index of Army Publications and Blank Forms		30 Jun 87
DA Pam 280–5–2	Nonappropriated Funds Food Operations Manual		27 Aug 87
DA Pam 600–80	Executive Leadership		19 Jun 87
DA Pam 608–41	Army Family Action Plan II		19 Jun 87
DA Pam 700–28	Integrated Logistic Support Program Assessment Issues and Criteria		4 Sep 87
DA Pam 738–751	Functional Users Manual for the Army Maintenance Management System Aviation (TAMMS–A)		15 Jul 87
JFTR	Joint Federal Travel Regulation, Vol. I	9	Sep 87
UPDATE 10	Message Address Directory		31 Jul 87
UPDATE 12	Enlisted Ranks Personnel		2 Sep 87
UPDATE 13	Morale, Welfare and Recreation		19 Aug 87

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Augustyn, *Research in Federal Income Taxation*, 38 U. Fla. L. Rev. 767 (Tax 1986).

Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 Wash. & Lee L. Rev. 51 (1987).

Childs & Strobel, *Seller-Financed Real Estate Transactions After the Tax Reform Act of 1986*, 14 J. Real Est. Tax'n 299 (1987).

Cross, *Procedural Due Process Under Superfund*, 1986 B.Y.U. L. Rev. 919.

Development in the Law—Jar Wars: Drug Testing in the Workplace, 23 Willamette L. Rev. 529 (1987).

Gibson & Klayman, *Landlord Liability: A New Dimension*, 25 Am. Bus. L.J. 1 (1987).

Graham, *Evidence and Trial Advocacy Workshop: Admissions of a Party-Opponent—Adoptive and Representative; Personal Knowledge*, 23 Crim. L. Bull. 374 (1987).

Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 Tex. Int'l L.J. 169 (1987).

Levitt, *Combatting Terrorism Under International Law*, 18 U. Toledo L. Rev. 133 (1987).

Niehous, *Thoughts on What U.S. Reaction Should Be After a Terrorist Strike—A Hostage Viewpoint*, 18 U. Toledo L. Rev. 151 (1986).

Pipko & Pipko, *Inside the Soviet Bar: A View from the Outside*, 21 Int'l Law. 853 (1987).

Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. Crim. L. & Criminology 1023 (1986).

Schulhofer, *Reconsidering* Miranda, 54 U. Chi. L. Rev. 435 (1987).

Siers, *The Anatomy of Defense Strategy in an Espionage Case*, 23 Crim. L. Bull. 309 (1987).

Swift, *Abolishing the Hearsay Rule*, 75 Calif. L. Rev. 495 (1987).

Comment, *The Best Interests of Children and the Interests of Adoptive Parents: Isn't it Time for Comprehensive Reform?*, 21 Gonzaga L. Rev. 749 (1985–86).

Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. Chi. L. Rev. 740 (1987).

Note, *Assuring Federal Facility Compliance With the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 Wm. & Mary L. Rev. 513 (1987).

Note, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 Va. J. Int'l L. 655 (1987).

Note, *The Rights of the Biological Father: From Adoption and Custody to Surrogate Motherhood*, 12 Vt. L. Rev. 87 (1987).